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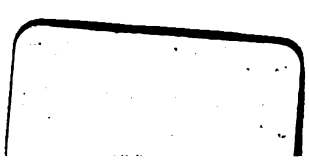

A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE.

Quid triſtes querimoniæ,
Si non ſupplicio culpa reciditur.
HORAT. Lib. 3. Ode 24.

VOL. I.

LONDON:
PRINTED BY A. STRAHAN,
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1803.

BODLEIAN
- 6 JAN 1952

TO

THE HONOURABLE

Sir SOULDEN LAWRENCE, Knight,

ONE OF THE JUSTICES

OF HIS MAJESTY's COURT OF KING's BENCH,

THIS TREATISE

IS,

WITH GREAT RESPECT AND ESTEEM,

DEDICATED

BY HIS MUCH OBLIGED,

AND VERY FAITHFUL HUMBLE SERVANT,

EDWARD HYDE EAST.

PREFACE.

I SHOULD have conſidered it an unbecoming preſumption, as well as an unneceſſary labour, had I ventured, without additional materials, on a new arrangement and diſcuſſion of the ſubject of theſe volumes, already ſo ably and authoritatively treated of by Lord C. J. Hale and Mr. Serjt. Hawkins. But it is now near ninety years * ſince the laſt of thoſe authors publiſhed his valuable work, and the accumulation of new matter, both by ſtatutes and adjudged caſes, is become ſo great, that a reviſion of this moſt intereſting branch of our law would, I thought, be an acceptable offering to the members of my profeſſion, however far the execution of it might fall ſhort in point of ability of thoſe models which they have been accuſtomed to contemplate.

It may be ſaid, that much has already been done towards the completion of what I have propoſed by the excellent diſcourſes of Mr. Juſtice Foſter, by the notes which have from time to time been added to the ſeveral editions of Serjt. Hawkins's work, and by a collection of caſes on the crown law publiſhed within a few years paſt by Mr. Leach.

With reſpect to the firſt of theſe, it is greatly to be lamented, from the ſpecimen which that learned judge has given of his talent in this ſpecies of writing, that he did not take a more general view of the criminal law, which he ſeems at one time to have meditated. Had he extended the ſame attention to other parts of

* The firſt edition was printed in 1716.

it as he has done to the ſubjects of High Treaſon and Homicide, this, or any other treatiſe of the like ſort, would have been much leſs wanted. His ſearching and well-poiſed mind would have cleared many of the difficulties which have impeded my progreſs, and the authority of his opinion would have ſettled many doubts which I have only ventured to ſuggeſt, or at moſt to hint a ſolution of.

With regard to the additions made to the ſubſequent editions of Hawkins, however ſerviceable as notes and references, yet from the very nature of ſuch materials they are for the moſt part little calculated to give that complete and ſatisfactory information, which is eſſentially requiſite to be obtained without delay in criminal caſes.

The publication of Mr. Leach's reports is of another deſcription. About a twelvemonth or more before that made its appearance, I had begun to make a collection of Crown MSS. with a view to a work of this kind at ſome diſtant period, and had been furniſhed with many of the caſes which are to be found in that book particularly by the late Mr. Juſtice Buller, who encouraged me to undertake the publication of them, provided I could obtain the conſent of the other judges, without which he did not feel himſelf at liberty to do more than to furniſh me with copies for my own information and amuſement. While I was deliberating upon his propoſal, Mr. Leach's book was firſt publiſhed, which removed part of the difficulty I had felt in making the deſired application to the judges; and ſoon afterwards in the courſe of July 1789, Lord Kenyon, by the conſent of the whole bench, gave me permiſſion to take a copy of that collection of caſes, of which as chief juſtice of the court of king's bench he was the depoſitary, and which will hereafter be mentioned in the

liſt

liſt of MSS. referred to in the ſubſequent ſheets. From ſeveral of the other judges I alſo received the moſt liberal communications of their own MSS. and particularly from Mr. Juſtice Gould, whoſe venerable years and indefatigable profeſſional labours had given him more opportunity than any other of making a large collection of caſes within his own time. Theſe MSS, as coming from the moſt authentic ſources, carry with them the greateſt authority. If however my intention had been merely confined to publiſh a collection of crown caſes, it is probable that Mr. Leach's book would have made me refrain, from a conſideration, ſince juſtified by the event, that whatever inaccuracies firſt appeared in that volume, the principal at leaſt would be ſoon corrected in the ſubſequent editions. But as my intention went further, and I had originally propoſed to exhibit the modern deciſions in the ſhape of notes to Lord Hale's Summary, taking that as the ground work of the arrangement, on account as well of its authenticity, as its brevity, the printing of many of thoſe deciſions, together with the accumulation of additional matter, ſtimulated me to enlarge my plan, and to take a more general view of the criminal law, in which I was further encouraged by the friendly communication of other MSS., as ſoon as my deſign was known, from many gentlemen, whoſe names I ſhould be proud to connect with my own if I were at liberty ſo to do.

I was thus drawn on by degrees to engage in this very arduous undertaking before I was well aware of its magnitude. Let this be ſome alleviation of my preſumption with the public: and the members of my own profeſſion, who can alone juſtly eſtimate the extreme labour and difficulty as well as the painful anxiety accompanying an attempt of this nature, will, I truſt, judge of it with their habitual candour and indulgence. I make no apology for the length of

time the work has been preparing for, and in the preſs: I am more afraid that the importunity of friends has led me to haſten the publication of it ſooner than I ought in prudence to have done: but had I waited till I had ſatisfied myſelf with my own corrections of it, I know not when my mind would have been relieved from the burthen which has already broken in too much upon my private life.

Having been led to mention the name of my departed patron and friend, Mr. Juſtice Buller, to whoſe notice and regard I was recommended at my firſt outſet in the profeſſion of the Law by one whom we held in equal reverence and eſtimation, I truſt it will not be thought too great a deviation from the purpoſe of this introduction, if ſtrongly impreſſed by a ſenſe of the obligations I owe to him, I ſhortly trace, and add my humble endeavour to continue the memory of his many amiable and excellent qualities. At a very early period of his life, having been advanced to the rank of one of his majeſty's counſel, and being puiſne judge of Cheſter, he was in the thirty third year of his age, on the death of Sir Richard Aſton, which happened in the year 1778, placed upon the Engliſh bench at the inſtance of Lord Mansfield, who recommended him to that high ſtation, from having diſcovered in him thoſe talents and that knowledge, which pointed him out as the ableſt aſſiſtant he could ſelect from the bar of the court, in which he preſided. If any man were arrogant enough at the time to queſtion the judgment of Lord Mansfield upon that occaſion, the very active and able part which Mr. Juſtice Buller ſuſtained in the adminiſtration of juſtice for more than ſeventeen years during which time he ſat in the court of king's bench, as well as the ſhare which his declining health permitted him to take in public buſineſs during the ſix years he was a judge of the court of Common Pleas, would

moſt decidedly prove the diſcernment of that noble and enlightened magiſtrate, who left the public to regret as little as poſſible thoſe infirmities, which prevented the continued exertion of his own ſplendid talents, when to the abilities of the other judges of his court he added the induſtry, ſagacity, quickneſs, and intelligence, for which Mr. Juſtice Buller was moſt eminent. And perhaps the wiſdom of Lord Mansfield's recommendation cannot be more ſtrongly evinced, than by recollecting that the whole buſineſs of the ſittings in Weſtminiſter and London, during the two or three laſt years of his being chief juſtice, was conducted ſolely before Mr. Juſtice Buller; in the courſe of which many great and important queſtions, extenſively affecting the real and commercial intereſts of this country, were determined by him with a promptitude and juſtneſs of deciſion, which would alone place him very high in rank among thoſe judges, whom this country has been uſed to regard with admiration and reverence. That the opinion which Lord Mansfield formed of him when raiſed to the bench was not altered, when he himſelf retired from office, is certain; for it is known, that if he had had the nomination, he would have named Mr. Juſtice Buller as his ſucceſſor *. In regard to his adminiſtration of criminal law, it uſed to be ſaid of him by thoſe, who from their ſituation in life were moſt likely to form a true judgment of that part of his character, that no perſon if guilty would chuſe to be tried by him, but that every one if innocent would prefer him for his judge:

* In mentioning this anecdote, I truſt no one will ſuſpect me of intending the ſlighteſt diſreſpect to the late Lord Kenyon, of whom it has been juſtly obſerved, that he poſſeſſed more juridical knowledge than any other intermediate ſucceſſor of the learned Hale; my ſole object is to record the teſtimony, which, after many years experience, Lord Mansfield bore to the fitneſs of Mr. Juſtice Buller to fill the higheſt judicial ſituation in the Courts of common law.

judge: than which nothing ſurely can deſcribe more emphatically the general opinion of his great diſcernment and impartiality. In private life he united the moſt amiable temper with the moſt frank and conciliating manners, and, without regarding his own time or trouble, encouraged by the kindeſt attention and the moſt willing aſſiſtance the younger members of that profeſſion of which he was himſelf a diſtinguiſhed ornament.

I ſhall now proceed to make a few general remarks on the ſcope and conduct of the work, and then conclude with mentioning the ſeveral MSS. and publications which are referred to in it.

In drawing the outline of this treatiſe I have endeavoured as much as poſſible to claſs together kindred offences. This has led me to depart in ſome inſtances from the more uſual arrangement; but the convenience in practice from bringing together approximating offences into one view and in the ſame volume, will, I truſt, compenſate for ſuch deviation from the beaten path. For this purpoſe I have firſt claſſed together all offences againſt religion and the church eſtabliſhment. Next, ſuch as touch the perſon and majeſty of the king and the allegiance due to him as the ſupreme magiſtrate of the ſtate. This claſs of courſe includes ſeveral offences inferior to High Treaſon, though of the like tendency, which are noticed in the progreſs of the principal inquiry. Next are claſſed offences immediately againſt the *perſon*, amongſt which I have ranged ſuch as relate to forcible, clandeſtine, and illegal marriages for the reaſons hereafter ſuggeſted. Then follow offences immediately againſt *property*, beginning with thoſe the principal object of which is the gain of the offender, and which are ſaid to be done lucri cauſâ, and ending with thoſe inſtigated by mere malice, including ſuch as are of a mixed nature. Theſe conclude the two firſt volumes which are now

publiſhed. A third volume, which is in conſiderable forwardneſs will include the offences of which I have not already treated, and conclude with a general view of the practical progreſs of criminal proceedings from the arreſt of the offender to the final conſummation of the law.

I wiſhed much to have brought this work into a narrower compaſs, which might have rendered it in ſome reſpects more convenient for common uſe, and would have ſaved me much time, labour, and expence; but theſe ends could not have been obtained without greatly leſſening the utility and value of the materials. It is well known to every lawyer that in criminal matters an abbreviation of an adjudged caſe is very ſeldom ſatisfactory, and that of a ſtatute is nearly uſeleſs, and can never be ultimately relied on. In many inſtances where the marginal abſtract of a caſe will, I truſt, be thought to give the full ſubſtance and effect of it, yet the caſe itſelf could not with any propriety have been omitted, without aſſuming to myſelf an authority which all might well diſpute, who wiſhed for more authentic information of the deciſion, and many would regret on account of loſing the preciſe and formal precedent, which has its uſe. The importance and neceſſity indeed of having the moſt correct information at hand is ſufficiently obvious to thoſe who practiſe at the crown bar, where it is moſt uſual, and always deſirable for the ends of juſtice and the influence of example, as far as certainty can be reaſonably obtained, that the trial which commences ſhould without intermiſſion be definitively concluded by judgment. Without loſing ſight of theſe moſt important objects, a faithful tranſcript of all the operative parts of the ſtatutes * in queſtion, and an authentic

* The ſtatutes when quoted verbatim are put within inverted commas; but thoſe are omitted in ſome inſtances where the purpoſe was of a ſecondary nature, and ſufficiently anſwered by ſetting forth the ſubſtance.

authentic ſtatement of the adjudged caſes, I have endeavoured to abbreviate all general matters which are of common notoriety, and are treated of in other well known books. Some heads which are grown almoſt obſolete I have very ſhortly touched upon, and having nothing new to add have contented myſelf with referring to other works where they are more fully diſcuſſed. And as the object of this treatiſe is confined to the deſcription of ſuch offences alone as are cognizable in the principal criminal courts of oyer and terminer and gaol delivery, I have only occaſionally noticed ſuch ſtatutes as refer to the juriſdiction of inferior magiſtrates upon ſummary proceedings, where I thought they might explain or illuſtrate the principal matter: it was indeed the leſs neceſſary to ſwell this work to a ſtill more inconvenient ſize by their introduction, as it is impoſſible to arrange thoſe laws in a more convenient and judicious manner than that in which they are already to be found in the admirable volumes of Dr. Burn.

EDWARD HYDE EAST.

Adelphi Terrace,
May 1803.

The following is an Account of the principal MSS. referred to in this Work.

1. A copy of a book, in which the crown caſes reſerved for the opinion of the Judges for many years back are entered. The original is in the cuſtody of the Lord Ch. J. for the time being of the Court of King's Bench. The determinations are entered ſhortly, ſometimes with the reaſons, but generally without. This deficiency I have been enabled to ſupply for the moſt part by the aſſiſtance of the private MS. next after mentioned. This book is cited as MS. Crown caſes reſerved; abbreviated, MS. Crown caſ. reſ.

2. Copies of the reſerved caſes above referred to, which were delivered to the ſeveral Judges before they met to conſider of them, with their memoranda or notes of the grounds of the determinations. I have been liberally favoured with communications of this kind from ſeveral of the Judges, which are quoted as MS. Jud. or MS. of the Judges. Part of theſe, I may now mention without breach of delicacy, as having been communicated to me by the late Mr. Juſtice Gould and Mr. Juſtice Buller, and which have the ſanction of their names.

3. Lord Hale's Summary, interleaved with MS. corrections and additions. This MS. compilation, though began before, (probably by Mr. Stow a gentleman at the bar) was put into its preſent form by Mr. Juſtice Yates, whoſe ſon is now in poſſeſſion of it. Copies of it were communicated to different Judges, who have contributed from time to time the fruits of their own experience. My own copy was taken from one in the poſſeſſion of the late Mr. Juſtice Buller. The work was bound up in three volumes, according to which I have cited it by the deſcription of 1. 2. and 3 MS. Sum. and I have added the page of the MS., becauſe copies of it are now in the hands of many gentlemen of the profeſſion. The greateſt part of the work is a compilation from printed books, chiefly from Mr. Juſtice Foſter's Treatiſe on the Crown Law, Lord Hale's and Hawkins' Pleas of the Crown.

4. One

4. One volume of MS. is cited by the name of MS. Tracy, by which Judge it was compiled as a comment on Lord Hale's Summary. A copy of this, which is occaſionally referred to in Mr. Juſtice Foſter's treatiſe, was communicated to me by Mr. Juſtice Lawrence.

5. A ſimilar compilation by Mr. Juſtice Burnet. The original is part of a moſt valuable collection of law MSS. made by Lord Chancellor Hardwicke: a copy of which was furniſhed to me by his deſcendant, my worthy friend, the Right Honorable Charles Yorke. This is cited as Burnet's MS. Summary, or, MS. Burnet.

6. Lord Holt's MS. from the laſt-mentioned collection.

7. A MS. volume of Crown caſes communicated by the late Lord Aſhburton to Mr. Juſtice Heath, by whom I was favoured with a copy. Theſe, which are cited as MS. Dunning, were taken by his Lordſhip when at the bar.

8. A MS. work of the late Mr. Serjeant Forſter, being a Treatiſe of the Crown Law, and probably intended by him for publication had he lived to have given it the finiſhing reviſal: Mr. Bolton, whoſe property in it was derived immediately from the author, very liberally confided the cuſtody of it to me, with liberty to make what extracts from it I pleaſed. But as I found that the author had been working upon materials ſimilar for the moſt part to my own, the uſe I have made of his treatiſe has been very ſparing, confined altogether to a few original caſes which had chiefly fallen under his own notice, and which I have marked with his name.

9. MSS. of Mr. Maſterman, ſometime ſince Secondary of the Crown Office, for the uſe of which I am indebted to Mr. Barlow, the preſent Secondary, to whom they belong.

10. Two volumes of MS. caſes, cited as Shapleigh's MS., the name of a gentleman formerly at the bar, who it was once ſuggeſted to me was probably the author. I have ſince however had reaſon to doubt the information. They were communicated to me by Charles Short, Eſq. the Clerk of the Rules on the plea ſide of the court of K. B. who received them from a relation of his at the bar long

long ſince deceaſed; but he knows not by whom they were taken. Mr. Juſtice Buller, who formerly inſpected them, gave them the praiſe of accuracy.

11. A few MS. caſes taken by myſelf, or communicated to me by friends, for whom I am gladly reſponſible. Theſe are ſimply marked MS.

Of printed books with varying editions, it may be uſeful to remark thoſe which I have uſed:

Crown Circuit Comp. 1738, in the firſt part of the work, and latterly the edition of 1799.

Dalton's Juſtice, fo. edit. 1727.

Leach's Crown Caſes, 2d edit. in the firſt part and latterly the edition of 1800, in two volumes.

State Trials, Hargrave's edit.

Statutes, Runnington's edit.

With the following liſt of Errata and Addenda will be found a few caſes which were not decided in time to be noticed in their proper places in the progreſs of the Work,

ERRATA ET ADDENDA.

Page

2. V 9. dele "*by perſons holding places at court*," and add "*By barriſters, &c. form of oaths and tender.*" §. 19.
107. line 17. for "*confirmed*" read "*confined.*"
117. line 9. for "*is*" read "*was.*"
270. line 17. for "*were*" read "*was.*"
370. laſt line note, add "O. B. December 1775, *mi.* 1 Leach, 160. Captain Roche's caſe. A later inſtance was that of Governor Wall, tried and executed for the murder of Benjamin Armſtrong a ſoldier, at Goree in Africa, O. B January 1802."
383. add to Beaver's caſe in the margin "Hil. term 1785; and refer to Rex v. Pickerſgill and others, Cald. 297."
396. line 9 for "Lord C. J. *Pratt*" read "Lord C. J. *King.*"
416. line 3 and 5 from the bottom, for "*priſoner*" read "*proſecutor.*" laſt line, for "*and*" read "*as*" (this is right in many copies).
427. at the end of title *aſſaults*, &c. add "ſtat. 33 Geo. 3. c. 67. aſſaults on ſeaman, keelman, caſter, or ſhip-carpenter, with intent to obſtruct them in their buſineſs; a miſdemeanor for the firſt offence, felony and tranſportation for the ſecond offence."
549. after line 31. add "6. Advertiſing reward, &c. for ſtolen goods, a forfeiture of 50*l.* by ſtat. 25 Geo. 2. c. 36. §. 155. *b.*"
579. S. 21. refer to "ſtat. 42 Geo. 3. c. 81. ſ. 1." paſſed ſince that part was printed.
582. Moore's caſe; refer to "ſtat. 42 Geo. 3. c. 81. ſ. 1." ſince paſſed.
589. ſtat. 13 Geo. 3. c. 32. refer to "ſtat. 42 Geo. 3. c. 81. ſ. 4." ſince paſſed.
603. ſ. 38. refer to the ſame ſtatute.
605. refer from Thomas's caſe to "ſtat. 42 Geo. 3. c. 81. ſ. 3." ſince paſſed, which cures the difficulty.
609. as to *ſtealing deer*, refer to "ſtat. 42 Geo. 3. c. 107. ſince paſſed, which again makes the offence of *ſtealing deer* in *incloſed* grounds felony, and ſubjects to tranſportation for 7 years; in other grounds, to a penalty of 50 l. for the firſt offence, and felony and 7 years' tranſportation for the ſecond."
658. line 6. in the margin dele "*at.*"
706. laſt line in the margin, for "Cro. Cir. *Comp.*" read "Crown Circ. *Comp.*"
826. laſt line, add "13 Vin. Abr. 460."
845. add "xiii. Forging, &c. *contracts*, *aſſignments*, *certificates*, or *receipts*, reſpecting the redemption of the *land-tax*, a capital felony by ſtat. 42 Geo. 3. c. 116. ſ. 194." §. 31. *b.*
864. At the head of the ſecond note for (*a*) place (*b*).
872. in margin, for "8 Geo. 2." read "8 Geo. 1."

Addenda.

Addenda.

Pooley's caſe, MS. Jud.

The ſtat. 7 Geo. 3. c. 50. ſ. 2. does not extend to the ſervants of the poſt-office: and therefore a conviction of one of them for ſtealing out of the poſt-office a letter ſent to be delivered by the poſt, held wrong. (Poſt. ch. 16. ſ. 38.)

Benjamin Pooley was tried before Lawrence J. at the Old Bailey in 1801, and convicted on an indictment founded on the ſtat. 7 Geo. 3. c. 50. ſ. 2. charging him with ſtealing out of the poſt-office a letter ſent to be delivered by the poſt. It appeared in evidence that the priſoner was employed in the Penny Poſt department as a charge-taker and as a letter-carrier; and that as charge-taker the letters arriving by the General Poſt, which were to be delivered by the carriers of the Penny Poſt of the eaſtern diviſion, were delivered to him to be divided according to the different walks of the letter-carriers; and that he did not deliver the letter which was the ſubject of the indictment to the letter-carrier within whoſe walk the perſon lived to whom it was directed; but that he afterwards opened it, and took out of it a checque or draft for 200*l.* on the Stratford Place bank, drawn on unſtamped paper by a perſon living above 30 miles from Stratford Place. It was objected for the priſoner, that this draft being on unſtamped paper could not be received in evidence as a medium to ſhew that the priſoner had ſtolen the letter: but the court over-ruled the objection, being of opinion that the draft, though unſtamped, might be received in evidence for collateral purpoſes, though not for the purpoſe of recovering the money contained in it. But the Court entertained doubts whether the ſecond ſection of that act applied to *ſervants* of the poſt-office, againſt whoſe miſconduct the firſt ſection of the act was intended to guard; and from which it might be inferred that the Legiſlature did not conceive, that the embezzling a letter by thoſe ſervants was a larceny: and Strutt's caſe, Leach 100. was referred to, where Nares and Willes Juſtices, and Glynn Serjeant Recorder were of that opinion. On the 23d of June 1802 all the Judges agreed that the conviction was wrong, being of opinion that the 2d ſection of the ſtat. 7 Geo. 3. c. 50. did not extend to the ſervants of the poſt-office; which opinion was founded on comparing that ſection with the 1ſt and 3d ſections of the act. The priſoner was accordingly recommended for a pardon.

Draft on unſtamped paper may be received in evidence for collateral purpoſes as to prove the offence of ſtealing, &c.

Harris's case, MS. Jud. *Conviction on the Black Act for firing at one who came to execute a writ of poſſeſſion with a warrant, in which the party's name was inſerted after the ſealing by the ſheriff, but before delivery out of the office by the under-ſheriff, held good.* (poſt. ch. 8. ſ. 6.)

John Harris was tried before Rooke J. at Salop, March 1801, for wilfully ſhooting at Thomas Banks; and being convicted, received ſentence; but execution was reſpited to take the opinion of the Judges on the following facts. Thomas Banks went with a warrant from the ſheriff of Salop to execute a writ of poſſeſſion on the priſoner's houſe. The warrant was addreſſed to three perſons, the ſheriff's bailiffs, and *after it was ſealed*, but *before it was ſent out of the office*, an interlineation was inſerted by the under-ſheriff in theſe words; "and to Jeremiah Powell and Thomas Banks, my "bailiffs on this occaſion only." Powell and Banks went to the priſoner's houſe to execute the writ of poſſeſſion, and deſired admittance. The priſoner looked out of the window, and they ſhewed him their warrant. The priſoner ſaid, that the firſt perſon who came in he would blow his brains out. Banks then went for more help, and returned with another man. They then burſt open the door of the houſe, and the priſoner fired a blunderbuſs at them, and wounded Banks very ſeverely in the knee. It was objected by the priſoner's counſel at the trial, firſt, that the warrant gave no authority to Banks or Powell, their names being interlined after the ſeal was affixed to it. Secondly, that the priſoner having ſhot at Banks in his own houſe, this was not within the meaning of the ſtatute. But the Judges held the conviction proper.

Vide Padfield v. Cabell and others, Willes' Rep. 411. which was referred to.

Martin's case, MS. Jud. *Indictment charging that the priſoner on the 14th of February, &c. uttered baſe coin to W. C. knowingly, &c and that on* the ſaid 14th of February, *&c. he uttered to J. L. &c. is ſufficient to warrant the higher judgment required by ſtat.* 15 G. 2. c. 28. ſ. 3. *on ſuch as utter baſe coin twice on the ſame day: for the day as laid is material.* (*Vide* poſt. ch. 4. ſ. 29.)

Robert Martin was tried before Graham B. at the Derby aſſizes, March 1801, upon an indictment on the ſtat. 15 Geo. 2. c. 28.; the firſt count of which charged, that the priſoner on the 14th of *February*, in the 41ſt year of the King, one piece of falſe and counterfeit money made to the likeneſs of a ſhilling, as and for current money of the realm, did utter to one *William Coxen*, well knowing the ſame to be counterfeit; and that the ſaid Robert Martin on *the ſaid 14th of February* one other piece of counterfeit money made to the likeneſs of a ſhilling, as and for current money of the realm, did utter to one *John Longden*, well knowing the ſame to be counterfeit, againſt the form of the ſtatute. There was a ſecond count for a ſingle utterance to Wm. Coxen. The jury found a verdict on the firſt as well as ſecond count, on evidence of knowingly uttering bad ſhillings twice on the 14th of February. But it was moved in arreſt of judgment

judgment for the increaſed puniſhment, that the charge in the firſt count for the ſecond utterance was uncertain, being laid on *the ſaid 14th of February*, inſtead of following the words of the ſtatute and laying it "on the ſame day;" inaſmuch as evidence of an utterance at any time before the indictment found would (it was ſaid) ſupport the firſt part of the charge; and therefore that it did not neceſſarily appear on the face of the indictment that the utterings were both on the *ſame* day. The queſtion was thereupon reſerved for the Judges, Whether, as the caſe was proved, the charge of the ſecond utterance in the firſt count were well laid?

At a conference on the 5th of June 1801, to which time the caſe was adjourned, the Judges were of opinion that the indictment was good; for that on the face of it the utterings appeared to be on the ſame day: and though when the day was not material, the fact might be proved on a day different from the day laid; yet where it was not indifferent the preciſe time laid muſt be proved: and that in this caſe it muſt be taken that it was proved that the defendant uttered counterfeit coin at two different times of the ſame day.

Vide Carliſle v. Trears, Cowp. 671. Johnſon v. Pickett, E. 25 Geo. 3. Pope v. Foſter, 4 Term Rep. 590.

An indictment charged that heretofore, viz. at the general quarter ſeſſions of the peace, &c. holden at Guilford, &c. on, &c. viz. the 15th of July, 40 Geo. 3. before, &c. juſtices of our Lord the King aſſigned to keep the peace, &c., the defendant, by the name and deſcription of Michael Michael of, &c. was *in due form of law tried and convicted* by a certain jury of the county, duly taken and ſworn between our ſaid Lord the King and the ſaid M. M. in that behalf, on a certain indictment then depending againſt him the ſaid M. M.; for that the ſaid M. M., on the 10th of July, 40 Geo. 3., with force and arms at, &c. one piece of falſe and counterfeit money made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and gold coin of this realm called an half guinea, as and for a piece of good, lawful, and current money and gold coin of this realm called an half guinea, unlawfully, unjuſtly, and deceitfully did *utter* to one Js. Senior; he the ſaid M. M. at the time when he ſo uttered the ſaid piece of falſe and counterfeit money then and there well knowing the ſame to be falſe and counterfeit: and that he the ſaid M. M. at the time when he ſo uttered the ſaid piece of falſe and counterfeit

Michael's caſe, O. B. Feb. 1802. MS. Jud. *An indictment charging that the defendant was before that time indicted for uttering baſe coin, knowing it to be falſe and counterfeit, and having about him at the time in his cuſtody and poſſeſſion other baſe coin, on which he was in due form of law* TRIED AND CONVICTED, *and adjudged by the Court there to be imprisoned for a year and find ſureties for two years more; and then covering that* HAVING BEEN SO CONVICTED AS A COMMON UTTERER OF FALSE MONEY

be afterwards knowingly uttered other baſe money, is good; without averring that the Court before whom he was tried and convicted for the firſt offence ADJUDGED HIM TO BE A COMMON UTTERER OF FALSE MONEY; *though the ſtat.* 15 & 16 *G.* 2. *c* 28. *ſays, that ſuch a perſon as is deſcribed in the firſt indictment* SHALL BE DEEMED AND TAKEN TO BE A COMMON UTTERER, *&c.* (Poſt. ch. 4. ſ. 29.)

counterfeit money as aforeſaid, viz. on the ſaid 10th of July, 40 Geo. 3. at, &c. had about him the ſaid M. M., in the cuſtody and poſſeſſion of him the ſaid M. M., one other piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and ſilver coin of this realm, called an half crown, he the ſaid M. M. then and there well knowing the ſaid laſt-mentioned piece of falſe and counterfeit money to be falſe and counterfeit; in contempt, &c. and againſt the form of the ſtatute, &c. and againſt the peace, &c.; and thereupon it was conſidered and adjudged by the ſaid Court that the ſaid M. M., for the miſdemeanor and offence aforeſaid in the indictment above ſpecified, ſhould be impriſoned in the common gaol of the county aforeſaid for the ſpace of one year, and until he found ſureties for his good behaviour for two years, to commence from the expiration of the firſt year, himſelf to be bound in 40*l.* and two ſureties to be bound in 20*l.* each; as by the record thereof doth more fully appear. And further, &c. that the ſaid M. M. late of L., labourer, *having been ſo convicted as a common utterer of falſe money*, afterwards, viz. on, &c. with force and arms at, &c. one piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and gold coin of this realm, called a ſeven ſhilling piece, as and for a piece of good, lawful, and current money and gold coin of this realm called a ſeven-ſhilling piece, unlawfully, unjuſtly, deceitfully, and feloniouſly did *utter* to one T. L., he the ſaid M. M. at the time when he ſo uttered the ſaid laſt-mentioned piece of falſe and counterfeit money, then and there well knowing the ſame to be falſe and counterfeit, in contempt, &c. and againſt the form of the ſtat. &c. and againſt the peace, &c. There was a ſecond count differing from the firſt, in charging the priſoner with *having been ſo convicted as aforeſaid*, inſtead of the words, "*having been convicted as a common utterer of falſe money.*"

The priſoner being convicted on this indictment before Mr. Common Serjeant (Silveſter), the following objection was taken in arreſt of judgment, which was referred for the opinion of the Judges. That in ſtating the original record and judgment of the court of quarter ſeſſions, it is not ſtated

that

that the Court did *adjudge* the defendant *to be a common utterer;* but only that they conſidered and adjudged the priſoner to be impriſoned twelve months, and to find ſurety for his good behaviour for two years more.

On the 5th of May 1802, the Judges on a conference held the conviction right; and that it was not neceſſary that the Court ſhould *adjudge* the defendant *to be a common utterer;* though the ſtat. 15 & 16 Geo. 2. c. 28. ſays he ſhall be *deemed and taken to be a common utterer;* that being a concluſion of law: and it being ſufficient for the Court, before whom a defendant is convicted of an offence within the ſtatute, to adjudge him to ſuffer the puniſhment inflicted by law on the offence.

Vide Tandy's caſe, and Smith's caſe, poſt. ch. 4. ſ. 29.

John Jackſon, and William Shipley, together with one John Morris, were charged with robbing W. S. in the dwelling-houſe of S. Rowe, in the pariſh of Gidling, in the county of Nottingham. The proſecutor proved that while he was threſhing in his father's barn in the afternoon of the 8th of February, at Gidling, Shipley and Morris came and aſked if W. S. lived there; being told by the proſecutor that he was the man, they aſked him if he remembered being with two ſoldiers a-while back, and lying with them, and being anſwered in the affirmative, they told him that one of the ſoldiers named Jackſon had ſaid that he (the proſecutor) had *abuſed* him; that Jackſon had come over to Carlton, and that if the proſecutor did not come and make it up with Jackſon the latter would certainly follow the law; but that if he went there and made it up with him there would be no more of it. The proſecutor anſwered that he knew nothing of the ſort, but that he would go and hear what Jackſon had to ſay. Shipley and Morris then went away, and the proſecutor followed them to a public houſe kept by S. Rowe at Carlton, where he alſo found Jackſon and another ſoldier. They there had ſome converſation in a private room, in which Jackſon preferred the ſame charge againſt the proſecutor of his having unnaturally abuſed him, which the other poſitively denied; and at laſt Jackſon told the proſecutor that if he would pay him the expences there ſhould be no more of it. The proſecutor ſaid he was willing to pay any thing in reaſon; and Jackſon left it to Morris and Shipley to make up the account; when they ſet down in

Jackſon, and Shipley's caſe, Nottingham Spring aſſizes, 1802, cor. Graham B. MS. Jud. *To conſtitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money muſt be taken* immediately *upon the threat made, and not after the parties have ſeparated, and time for the proſecutor to deliberate and procure aſſiſtance, and eſpecially after he had conſulted a friend who was even preſent at the time when the money was paid: though the proſecutor parted with his money from fear of loſing his character.* (Poſt. ch. 16. ſ. 130)

writing theſe articles, as mentioned by Jackſon. "Doctor 1l. 11s. 6d. For abuſing me 1l. 8s. Morris 10s. Shipley 5s. The other ſoldier 2s. 6d. (Caſt up and making together) 3l. 17s." They aſked however four guineas in all of the proſecutor, who ſaid he had no ſuch money, unleſs they would truſt him. Morris ſaid they muſt have the money with them. The proſecutor told them he had none unleſs he could get it of his parents, and he aſked one of them to go out with him, and Shipley accordingly went with him. The proſecutor ſwore that he was much frightened and hurried, and did not know what beſt to do. He with Shipley went to his mother's, where under pretence that a ſoldier had been hurt he obtained from her four guineas; and in their way back to the public houſe, the proſecutor ſtopped at the houſe of one W. Shelton, whom he deſired and finally prevailed upon to go along with him. Shelton inquired what was the matter, and being informed by Shipley of the nature of the charge againſt the proſecutor, declared his diſbelief of it, and that if it were his caſe he would not pay the money. Shipley ſaid, that if the proſecutor did not pay it, it would coſt him 50l. or 100l., or perhaps his neck; that he himſelf was a conſtable and ſhould go for a warrant the next morning. This language frightened the proſecutor very much. He returned to the public houſe, together with Shipley and Shelton, where he found Jackſon, Morris, and the other ſoldier in the room where he left them. After ſeating himſelf a minute or two he laid the money, amounting to four guineas, on the table, and aſked who would take it; they all ſaid Jackſon, but Shipley took it up; and amongſt them they returned back ſix ſhillings to the proſecutor, half-a-crown of which was ſaid to be for his friend's expences (meaning Shelton). The proſecutor aſked for a receipt, but was told by Morris that his friend would do as well. Shelton inquired what doctor Jackſon had applied to, but only received evaſive anſwers. The proſecutor then ſwore to the falſehood of the charge; but ſaid that he was ſcared at it, and that was the reaſon why he parted with his money. It appeared on the croſs examination that Jackſon had firſt made the charge on the 4th of February, the morning after the night they had lain together; but he did not repeat it then, and they continued eating and drinking together

for

for ſeveral hours after. That after this, the proſecutor had heard of his having repeated it in ſeveral companies, which had cauſed him much agitation of mind in the interval. Shelton confirmed the proſecutor's account as to what happened in his preſence; and ſwore further, that as they were going into the public houſe he called the proſecutor back, and adviſed him not to pay the money. He added, that the proſecutor was quite ſcared out of his wits.

From the whole of the evidence it ſeemed highly probable that the charge was falſe, and had been fabricated by Jackſon for the purpoſe of extorting money. Shipley's defence was, that he knew nothing of the matter but from Jackſon, who had perſuaded him of the truth of the charge. Graham B. in ſumming up the evidence obſerved, that the felonious and violent taking from the perſon money to any amount, by putting him in fear, conſtituted robbery; and that in law it amounted to ſuch a taking if the party delivered his money under the preſſure of great terror. And he pointed out to the jury the ſeveral circumſtances of the caſe, which ſhewed that the proſecutor was ſtrongly impreſſed not only with a fear of ſhame, but of a proſecution that might endanger his life.

After conviction, ſentence was paſſed on the priſoner; but execution was reſpited on a doubt conceived by the learned Judge whether this caſe did not go ſomewhat further than others of the kind which had been decided, and was ſtill further removed from the common acceptation of robbery; the principal circumſtance of difference being the preſence of the proſecutor's friend during the tranſaction.

In Eaſter term 1802 the Judges met to conſider this caſe, and a majority of them were of opinion that it was not robbery; though the money were taken in the preſence of the proſecutor, and the fear of loſing his character were upon him at the time. Moſt of the majority thought that in order to conſtitute robbery the money muſt be parted with from an *immediate* apprehenſion of preſent danger *upon the charge being made*, and not as in this caſe after the parties had *ſeparated*, and the proſecutor had time to deliberate upon it, and apply for aſſiſtance, and had applied to a friend, by whom he was adviſed not to pay it, and who was actually preſent

at the very time when it was paid: all which carried the appearance more of a compoſition of a proſecution than it did of a robbery; and ſeemed more like a calculation whether it were better to loſe his money or riſk his character. One of the Judges who agreed that it was not robbery went upon the ground that there was not a *continuing* fear, ſuch as could operate in conſtantem virum, from the time when the money was demanded till it was paid; for in the interval he could have procured aſſiſtance, and had taken advice. The minority, who held the caſe to be robbery, thought the queſtion concluded by the finding of the jury that the proſecutor had parted with his money through fear continuing at the time; which fell in with the definition of robbery long ago adopted and acted upon; and they ſaid that it would be difficult to draw any other line. That this ſort of fear ſo far differed from caſes of mere bodily fear, that it was not likely to be diſpelled as in thoſe caſes by having the opportunity of applying to magiſtrates or others for aſſiſtance; for the money was given to prevent the public diſcloſure of the charge.

Qu. if this deciſion do not in a great meaſure over-rule Hickman's caſe, p. 58, 728.

Hobſon's caſe, Shrewſbury Lent Aſſizes, 1803, cor. Chambre J. MS. Jud.

Where a ſervant was intruſted by his maſter to receive money for him in the county of A., which he was to bring to him in the county of B. the ſame day, and after ſuch receipt, inſtead of proceeding with the money directly, he loitered on the road till the day following, and when he got home denied his having received the money; held that ſuch denial was evidence to ſhew that his original receipt in A. was with intent to ſecrete and embezzle,

John Hobſon was tried upon an indictment on the ſtat. 39 Geo. 3. c. 85. for receiving money, by virtue of his employment as ſervant to one Thomas Heighway, on account of the ſaid T. Heighway his maſter, and fraudulently ſecreting and embezzling, and ſo ſtealing it; the indictment ſtating the money to be the property of the maſter. After Chambre J. had ſummed up the evidence to the jury, the priſoner's counſel ſuggeſted an objection that there was no proof of any fact ariſing in the county of Salop ſufficient to give juriſdiction for trial of the offence in that county. The proof (ſo far as relates to the objection) was, that the reſidence of the maſter was at Litchfield in Staffordſhire, where the priſoner ſerved him in his trade. That on the morning of Saturday the 22d of January they were both at Shrewſbury; and the maſter, having authoriſed one W. Beaumont to collect ſome debts for him at that place, returned home the ſame morning, leaving the priſoner at Shrewſbury to receive the money from Beaumont, and bring it to his maſter at Litchfield that night. The priſoner engaged to do ſo, and about noon received the money from Beaumont, and alſo a letter for his maſter, which had been left

left at Beaumont's, and did not relate to the money transaction. The priſoner left Shrewſbury ſoon after, but did not go on to Litchfield that night, having ſlept at a public houſe on the road; and he did not go to his maſter till the following evening. He then delivered the letter; and being aſked about the money, he ſaid he had not received any. A few days after the maſter, in conſequence of information he had received by letter, charged the priſoner with having received the money, and another ſervant who had been at Shrewſbury on the Saturday, being preſent, told the priſoner that he had ſeen him receive money, but the priſoner perſiſted in denying that he had received any. Sometime afterwards the maſter having received further intelligence bid the priſoner go to Shrewſbury to clear himſelf. On the Saturday following the priſoner went to Beaumont at his houſe in Shrewſbury, and deſired him to make a ſearch on the left-hand ſide of the room in which they had been: but no ſearch was made, Beaumont telling him it was of no uſe to ſearch, as the priſoner had received the money from him. The learned Judge, thinking the objection proper for the conſideration of the Judges, made no obſervations upon it to the jury; who found the priſoner guilty, and he received ſentence. The priſoner's receipt of the money at Shrewſbury, his going thither afterwards to clear himſelf, and on that occaſion deſiring a ſearch to be made for the money, as if he had left it there, being the only acts appearing to be done in Shropſhire, theſe queſtions were made; firſt, Whether, under this ſtatute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally ariſing within the ſame county? Secondly, Whether, if further local proof were neceſſary, the ſubſequent conduct of the priſoner at Shrewſbury were not ſufficient to obviate the objection, as being an act in furtherance of the purpoſe of ſecreting or embezzling. In Eaſter term following the Judges, having met to conſider this caſe, were of opinion that the trial was properly had at Shrewſbury. Moſt of them thought that as in the caſe of larceny at common law, ſo in this, where the ſtatute declared the offence to be of the ſame kind, the ſubſequent conduct of the priſoner

and ſo to ſteal the money, within the ſtat. 39 *Geo.* 3. *c.* 85, *and conſequently that the trial might be had in A.*

(*Vide* ch. 16. ſ. 18.)

ſoner, in not accounting to his maſter and denying the receipt of the money, was evidence to ſhew that the original taking was with intent to ſecrete and embezzle, and ſo to ſteal, within the meaning of the ſtatute; and the more ſo, as the act of ſecreting was a negative act. And ſome conſidered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon, in the other.

The caſe of Eaſterby and M'Farlane, MS. Jud.

The Admiralty have no juriſdiction to try offenders on the ſtat. 11 *Geo.* 1. *c.* 29. *for procuring the deſtruction of a ſhip of which they were owners, there being no evidence of any act of procurement done upon the high ſeas within the Admiralty juriſdiction, but only on ſhore within the body of a county.*

(*Vide* ch. 17. ſ. 14.)

At an Admiralty Seſſion holden before Sir W. Scott, Lord Ellenborough C. J. and Thomſon B., at the Old Bailey on the 26th of October 1802, William Codling and John Reid mariners, and William Macfarlane and George Eaſterby of London, merchants, were indicted on the ſtat. 11 Geo. 1. c. 29. ſ. 6 & 7. The indictment ſtated that W. Codling and J. Reid on the 8th of Auguſt, 42 Geo. 3. upon the high ſeas within the juriſdiction of the admiralty of England, were on board a veſſel called the Adventure, whereof Codling was the maſter and belonging to the ſame, and Reid an officer belonging to the ſame; which veſſel was inſured for 700l. by R. S. and certain other underwriters by name, who had before that time ſeverally underwritten a policy of inſurance on ſuch veſſel; and that Codling and Reid with force and arms on the high ſea within the juriſdiction aforeſaid, &c. wilfully and feloniouſly made divers holes in and through certain parts of the veſſel, by means whereof the ſea entered, filled, and ſunk the ſaid veſſel: and that Codling and Reid, ſo reſpectively being ſuch maſter and officer belonging to the ſaid veſſel, thereby wilfully and feloniouſly deſtroyed the ſaid veſſel, to which they, Codling and Reid, ſo reſpectively belonged, with a wicked and diſhoneſt intent and deſign to prejudice the ſaid R. S. &c. who had ſo underwritten the ſaid policy of inſurance on the ſaid veſſel, and were ſeverally and reſpectively inſurers on the ſaid veſſel; againſt the form of the ſtat., &c. And that W. Macfarlane and G. Eaſterby on the ſaid 8th of Auguſt, *on the high ſea, within the juriſdiction aforeſaid*, were owners of, and each of them was an owner of the ſaid veſſel called the Adventure, and ſo being ſuch owners, and each of them being ſuch owner, with force and arms wilfully and feloniouſly procured the ſaid W. Codling and the ſaid J. Reid the felony aforeſaid, in manner and form aforeſaid,

to

to do and commit; they the ſaid W. Macfarlane and G. Eaſterby at the time of the ſaid felony ſo done and committed by the ſaid W. Codling and J. Reid as aforeſaid being owners, and each of them being an owner of the ſaid veſſel; with a wicked and diſhoneſt intent and deſign to prejudice the ſaid R. S. &c. who had underwritten the ſaid policy of inſurance on the ſaid veſſel, and were ſeverally inſurers on the ſaid veſſel; againſt the form of the ſtatute, &c. There were other counts in ſubſtance the ſame as the firſt.

It appeared in evidence, that the veſſel called the Adventure, having taken in part of her cargo in the port of London, ſailed therewith to Yarmouth, where ſhe took in other part thereof, and from thence to Deal. That a few days after ſailing from Deal, and when ſhe was on the high ſeas within the juriſdiction of the Admiralty, at the diſtance of a few miles from Brighton on the coaſt of Suſſex, ſhe was ſunk by the means of boring ſeveral holes in the ſeveral parts of her bottom deſcribed in the indictment. Theſe were proved to have been done by the orders, and in the preſence, and with the aſſiſtance of the priſoner Codling, the maſter, for the purpoſe of thereby occaſioning the ſinking and deſtruction of the ſhip and her cargo. In reſpect to Eaſterby and Macfarlane it appeared that they were joint proprietors of the whole of the cargo which was ſhipped on board the Adventure; that they all along acted as, and declared and repreſented themſelves to be joint proprietors of the ſhip as well as of the cargo: that they particularly acted as ſuch in the hiring of perſons to ſerve on board the ſhip, in giving orders to, and treating with the captain as joint owners, both before and after the veſſel was deſtroyed; alſo in the giving orders for the effecting of an inſurance upon the ſhip on their joint account for 700l., and which was in fact underwritten by the ſeveral underwriters named in the indictment. That they alſo deſcribed themſelves in an inſtrument in writing ſigned by each of them, (and whereby Reid was appointed the ſuper-cargo), as "ſole proprietors and owners "of the brig Adventure." It appeared however by the production of the ſhip's regiſter from the cuſtom-houſe in London, that one A. Geddes was on the 12th of June 1802 the regiſtered owner of the ſhip Adventure deſcribed therein as of the port of London; and that the ſame ſhip was afterwards

wards on the 16th of June 1802 (by indorſement on the ſhip's regiſter) aſſigned by Geddes to the priſoner Macfarlane, from whom no ſubſequent aſſignment appeared to have been made. The cargo was on Tueſday the 10th of Auguſt 1802, being two days after the loſs, abandoned to the underwriters thereupon by a joint notice of abandonment ſigned by both the priſoners Eaſterby and Macfarlane, and the ſhip was on the ſame day, by a like notice ſigned by the priſoner Macfarlane alone, abandoned to the underwriters thereupon. It was under theſe circumſtances contended on the part of the priſoner Eaſterby, that he was not for want of a compliance with the requiſites ſpecified in the ſtatutes 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. an owner of the ſhip Adventure, ſo as to be liable in that character to the penalties of the ſtatute of the 11 Geo. 1. c. 29. ſ. 6. It appeared further by the evidence of one Storrow, who was originally retained by Eaſterby and Macfarlane to proceed as ſupercargo on board the ſhip, and who entered and continued on board till the ſhip arrived at Deal, that in a converſation between the witneſs and Eaſterby and Macfarlane at Eaſterby's houſe at Rotherhithe, about three weeks before the ſhip's ſailing, and after the witneſs Storrow had been applied to by Eaſterby to join the ſhip, Eaſterby threw out that many ſhips had been ſunk and might be ſo to take in the underwriters. That again afterwards, a few days before the ſhip ſailed, in another converſation between the witneſs, Eaſterby, Macfarlane, and Codling, at Rotherhithe, Eaſterby ſaid, "that they "wiſhed the ſhip to proceed from London to Yarmouth, "and from Yarmouth to Gibraltar, there to ſell the whole "of the cargo by contract at public vendue. That after "it was ſold they thought an opportunity might be taken "to ſink the ſhip, and that the people on board might take "the boat and get on ſhore; and that one half of the bills "for the amount of the cargo might be remitted in private "letters, and the other half in public letters, which latter "might be ſhewn as the whole of the proceeds, and that "the underwriters might be called on for the reſt, as if left "on board." To which Macfarlane and Codling aſſented. But though Eaſterby was afterwards ſeen at Deal, there was no evidence that either he or Macfarlane was ever perſonally preſent on board the ſhip Adventure on the high ſeas.

Vide Rolleſton v. Hibbert, 3 Term Rep. 406. and Hibbert v. Rolleſton, 3 Bro. Ch. Rep. 571. and Rolleſton v. Smith, 4 Term Rep. 161. Weſterdale v. Dale, 7 Term Rep. 306. and Camden v. Anderſon, 5 Term Rep 709.

ſeas. The intention of Eaſterby and Macfarlane that the ſhip ſhould be deſtroyed with ſuch cargo as ſhould be on board her at the time of her being ſunk was further proved by the circumſtance of their having cauſed to be effected inſurances upon the cargo to the amount in the whole of 10,250l., whereas the goods found on board after the ſhip with her cargo was weighed up and brought to land at Brighthelmſtone were proved to have been of the original value as between ſeller and buyer of 3231l. 1s. 6d. and no more; and by their having reſpectively withdrawn from the cargo, after the ſame had been originally ſhipped as part thereof, ſeveral articles, ſome being ſtores for the ſhip's uſe, a part of which were carried away by Eaſterby alone, and others put on board a ſhip called the William belonging to Eaſterby and Macfarlane, for the uſe of that ſhip; others being articles of conſiderable value packed up for exportation as merchandiſe, of which no leſs than 15 conſiderable packages were found in the houſe of Eaſterby; and other like goods which had been at Macfarlane's houſe were found at the houſe of a friend of Macfarlane, to which they had been removed for the purpoſe of concealment, upon Macfarlane's being taken into cuſtody. It was alſo proved that Eaſterby two days after the loſs of the veſſel came down to Brighton, near which place the ſhip had been caſt away, and that Eaſterby there in the preſence of Macfarlane and Codling aſked another witneſs (Cooper) where he had bored the hole, and what ſize it was, and whether it was about the ſize of the handle of a chiſſel which happened to be in the room where they were; and the witneſs having anſwered that it was thereabouts, Eaſterby bid him get the handle out of the chiſſel and ſharpen one end of it in order therewith to plug up the hole in caſe the veſſel ſhould drive on ſhore. That Eaſterby afterwards abuſed Codling for not having taken the veſſel to the coaſt of France, and there deſtroyed her. And that Macfarlane and Eaſterby then ordered Codling and Cooper to go to London together and ſecrete themſelves for their ſafety, which they accordingly did.

It was objected on the part of the priſoners Eaſterby and Macfarlane, that aſſuming them to be owners of the ſhip, and that the evidence ſtated proved them to have been guilty of felonioufly procuring the ſhip in queſtion to be caſt away or deſtroyed within the 6th ſect. of the act 11 Geo. 1.

c. 29., yet that the ſame offence did not appear to have been committed by them *on the high ſeas*, ſo as to bring the ſame within the juriſdiction of the Court of Admiralty under the 7th ſection of the act. The Court reſerved this queſtion alſo as well as that which had been before made relative to the ownerſhip of Eaſterby in the ſhip for the conſideration of the twelve Judges. And ſubject to thoſe queſtions left the fact of the wilful deſtruction of the ſhip by Codling and Reid, and of the wilful procurement of ſuch deſtruction by Eaſterby and Macfarlane, with intent to prejudice the above underwriters, to the jury, who acquitted Reid (*a*), and found the other priſoners reſpectively guilty (*b*). The queſtions for the opinion of the Judges were, firſt, Whether Eaſterby was an owner of the ſhip Adventure, ſo as to be liable in that character to the penalties of the ſtat. 11 Geo. 1. c. 29. ſ. 6.? Secondly, Whether the procurement of the deſtruction of the ſhip by Eaſterby and Macfarlane were an offence committed by them on the high ſeas within the juriſdiction of the Court of Admiralty under the 7th ſection of that ſtatute?

Vide Keilw. p. 67. 20 H. 7. 28 H. 8. c. 15. 2 & 3 Ed. 6. c. 24. ſ. 4.

This caſe was argued before all the Judges in the Exchequer-chamber on the 13th of November 1802, and afterwards at an adjourned meeting at Serjeants' Inn on the 30th of the ſame month. And at a ſubſequent meeting of the Judges on the 2d of February 1803 they were all of opinion, that whether the act of 11 Geo. 1. c. 29. were conſidered as making the perſons who direct or procure the deſtroying of a ſhip principals or acceſſaries; yet inaſmuch as no act was done by the priſoners Eaſterby and Macfarlane within the juriſdiction of the Admiralty, they were not ſubject to that juriſdiction, and conſequently that the trial was improperly had. It therefore became unneceſſary to determine the other points raiſed in the argument of the caſe.

The priſoners afterwards received a free pardon.

(*a*) On this account the evidence which went to affect Reid is not ſtated.

(*b*) No queſtion was reſerved as to Codling, who afterwards ſuffered the puniſhment of the law.

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A

TREATISE

ON THE

PLEAS OF THE CROWN,

&c. &c. &c.

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8. Saying or hearing Maſs, or other Popiſh Service. - - - § 18.
9. Non-taking the Oath of Supremacy, and making the Declaration againſt Popery.
By Eccleſiaſtics and others admoniſhed; by Members of Parliament; by Perſons holding Places at Court; by Perſons within ten Miles of London. - - - § 19.
10. Extolling or maintaining the Authority of the Pope or See of Rome. - - § 20.
11. Putting in Uſe Popiſh Bulls, Proceſs, &c. § 21.
12. Per-

12. Perverting others, or being perverted to Popery. - - - § 22.
13. Natural born Subjects ordained or profeſſed by Popiſh Authority abiding in the Realm, without ſubmitting themſelves. - § 23.
14. Relieving Popiſh Prieſts. - - § 24.
15. Refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhopric. - § 25.
16. Appointing Aliens to Church Preferment. § 26.
17. Exerciſing Juriſdiction of Suffragan without due Appointment. - - § 27.
18. Simony.
How far cognizable at Common Law.—Stat. 31 *Eliz. c.* 6. *W. & M. ſt.* 1. *c.* 16. 12 *An. c.* 12. - - - § 28.

I. *Of Blaſphemy, Contempt of the Eſtabliſhed Religion, Religious Impoſtors, and Immorality in general.*

§ 1. *Blaſphemy.* 1 Hawk ch. 5. 3 Bac. Abr. 474. 4 Blac. Com. 59. 62. *Vide* 9 & 10 W. 3. c 32. *infra, Religious Impoſtors.* 5 Eliz. c. 15. ſ. 2, 3.

ALL blaſphemies againſt God, or the Chriſtian Religion, or the Holy Scriptures, are indictable at common law, as well as upon the ſtat. 9 & 10 W. 3. c. 32. after mentioned. So are all impoſtors in religion; ſuch as falſely pretend to extraordinary miſſions from God, or terrify or abuſe the people with falſe denunciations of judgments. Theſe laſt, if the act be done with intent to make any public diſturbance, are by the ſtat. 5 Eliz. c. 15. puniſhable for the firſt offence by a fine of 10l. and one year's impriſonment; and for the ſecond, by impriſonment for life, and a forfeiture of all the offender's goods and chattels; one moiety to the crown, and the other to any perſon who ſhall ſue for the ſame. In like manner, all malicious revilings, in public derogation and contempt of the eſtabliſhed religion, are puniſhable by the common law, inaſmuch as they tend to a breach of the peace. Similar to theſe are all ſcandalous and open breaches of morality exhibited in the face of the people; ſuch as was the conduct of one who expoſed himſelf naked to the public view from a balcony in Covent-Garden.—Offences of this kind ſap public morals, the neceſſary foundation of good government; and are therefore properly cognizable by the temporal magiſtrates, who may puniſh the offenders by fine, impriſonment, and ſuch other corporal puniſhment as the circumſtances may require.

Contempt of the Eſtabliſhed Religion.

Open Immorality. Poph. 208. Sir Charles Sedley's caſe, 1 id. 168. 2 Str. 790.

Ch. I. § 2.

II. *Of Apoſtacy and Hereſy.*

§ 2.
1 Hawk. ch. 2.
1 Hale 387. 390. &c.
4 Blac. Com. 43—50.
3 Bac. Abr. 471.
5 Co. 58.
1 Eliz. c. 1. ſ. 36.
1 Ed. 6. c. 12. ſ. 3.
29 Car. 2. c. 9.
Vide 1 Hale 410.

Apoſtacy and Hereſy; the one an entire falling off from the Chriſtian Religion, the other, in its legal ſenſe, the adoption of any erroneous tenet not warranted by the eſtabliſhed church, are in their nature eccleſiaſtical offences, and properly inquirable and puniſhable by the ſpiritual court; the ſtat. 1 Eliz. c. 1. having repealed all former ſtatutes relating to hereſy, leaving it as at common law; and the ſtat. 29 Car. 2. c. 9. having taken away the writ de hæretico comburendo, by which the judgments of that court were ſometimes enforced, as well as all capital puniſhments in purſuance of eccleſiaſtical cenſures. But ſtill the common law courts will take cognizance incidentally whether or not a matter be hereſy, notwithſtanding the judgment of the eccleſiaſtical court; and will only give credence to their ſentence ſo far as it concerns eccleſiaſtical cenſures. And by the ſtat. 9 & 10 W. 3. c. 32. "If any perſon, having been educated in, or at any time having made profeſſion of, the Chriſtian religion within this realm, ſhall upon indictment or information be convicted by the oath of two or more credible witneſſes in any of the courts of Weſtminſter, or at the aſſizes, of denying, by writing, printing, teaching, or adviſed ſpeaking, any one of the perſons in the Holy Trinity to be God, or of aſſerting or maintaining that there are more Gods than one, or of denying the truth of the Chriſtian Religion, or the Divine authority of the Holy Scriptures, he ſhall for the firſt offence be adjudged incapable of any office or employment, eccleſiaſtical, civil, or military; and for the ſecond ſhall be diſabled to ſue any action, &c. or to be a guardian, executor, or adminiſtrator, or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice eccleſiaſtical, for ever, within this realm; and ſhall alſo be impriſoned for three years from the time of ſuch conviction." But it is thereby provided (ſ. 3.), that a public recantation of the error in the ſame court where the party was convicted, within four months after the firſt conviction, ſhall diſcharge him for the firſt offence from all diſabilities. And by ſ 2. no perſon ſhall be proſecuted under the act for any words

1 Hale 400, 7, 8.
1 Hawk. ch. 2. ſ. 7.

9 & 10 W. 3. c. 32 and *vide* 3 Jac. 1. c. 21. *to reſtrain profaneneſs in prayers.*

words ſpoken, unleſs information thereof ſhall be given on or within four days after to ſome juſtice of peace, and the offence be proſecuted within three months after ſuch information, Ch. I. § 2. *Apoſtacy, Hereſy.*

This ſtatute does not take away the common law proceeding againſt libellers of the Chriſtian Religion, which was the courſe lately adopted againſt a moſt impious writer of this ſort. Rex v. T. Paine at Guildhall.

III. *Reviling the Sacrament of the Lord's Supper, or profaning the Lord's Day.*

§ 3.

By the ſtat. 1 Ed. 6. c. 1. ſ. 1. "Whoever ſhall deprave, deſpiſe, or contemn the moſt bleſſed ſacrament of the Lord's Supper, in contempt thereof, by any contemptuous words, or words of depraving, deſpiſing, or reviling; or ſhall adviſedly in any otherwiſe contemn, deſpiſe, or revile the ſame, contrary to the effects and declaration aboveſaid, (i. e. as ſet forth in the preamble,) ſhall ſuffer impriſonment, and make fine and ranſom at the king's pleaſure," (i. e. in the diſcretion of the court). By the ſame ſection the offence is to be inquired of and indicted before juſtices of the peace (three at leaſt, and one of the quorum) in their quarter ſeſſions. By ſ. 5. the indictment muſt be preferred within three months after the offence committed. 1 Ed. 6. c. 1. ſ. 1. *repealed by* 1 Mar. c. 2. *and revived by* 1 Eliz. c. 1. ſ. 14. *Vide* 3 Bac. Abr. 477. (1 Hale 375.)

The profanation of the Lord's-day or Sunday, is by a variety of ſtatutes puniſhable in particular inſtances by ſummary proceſs before magiſtrates; but it is alſo ſaid to be indictable at common law; and there is a precedent of ſuch an indictment againſt a butcher, in which he is charged to be a common Sabbath breaker and profaner of the Lord's-day, and for having within certain times mentioned kept public and open ſhop, and expoſed meat to ſale to divers perſons unknown. *Profaning the Lord's-day.* Cr. Cir. Com. 155. 1 Hawk. ch. 6. ſ. 1. 2. 3.

IV. *Pretending to Witchcraft.*

§ 4.

The better ſenſe of modern times has properly transferred the puniſhment from the actual commiſſion of this ſuppoſed offence to the impoſtors who now make pretence to it. For the ſtat. 9 Geo. 2. c. 5. ſ. 3 & 4. enacts, that "No proſecution, ſuit, or proceeding ſhall be had againſt any *Vide* 1 Hawk. ch. 3. 4 Blac. Com. 60. 9 Geo. 2. c. 5. *repealing the ſtat* 1 Jac. 1. c. 12.

Ch. I. § 4. *Witchcraft.*

perſon for witchcraft, ſorcery, enchantment, or conjuration, or for charging another with any ſuch offence, in any court in Great Britain: and that if any perſon ſhall pretend to exerciſe or uſe any kind of witchcraft, &c. or ſhall undertake to tell fortunes, or pretend by their ſkill or knowledge in any occult or crafty ſcience, to diſcover where or in what manner any goods or chattels ſuppoſed to have been ſtolen or loſt may be found; every ſuch offender, being thereof lawfully convicted on indictment or information, ſhall be impriſoned for one year; and once in every quarter of the ſaid year, in ſome market town of the proper county, upon the market day there, ſhall ſtand openly on the pillory for one hour, and alſo ſhall (if the court think fit) give ſureties for good behaviour in ſuch ſum and for ſuch time as the court judge proper, and in ſuch caſe be further impriſoned until ſuch ſureties be given." Alſo by the vagrant act 17 Geo. 2. c. 5. f. 2. all jugglers, fortune-tellers, and gypſies pretending to ſkill in phyſiognomy, palmiſtry, or the like crafty ſcience, or pretending to tell fortunes, &c. ſhall be deemed rogues and vagabonds, and ſuffer as the act directs.

17 Geo. 2. c. 5.

V. *Offences more peculiarly relating to the Church Eſtabliſhment and Diſcipline.*

1. Conformity required by Law.

§ 5. A multitude of ſtatutes have been paſſed from time to time for the protection of the eſtabliſhed church, and to promote conformity thereto; particularly in oppoſition to the popiſh religion and ſuperſtitions. It is uſeleſs at this day to inquire into the hiſtory of all theſe laws, many of which would only form a catalogue of human woes. Doubtleſs moſt of theſe proviſions were found neceſſary in times of fraud and violence, and while the church, as by law now eſtabliſhed, was in its infancy: they were paſſed, to uſe the words of Lord Bacon, upon the ſpur of the occaſion. But the ameliorated ſtate of the civilized world, and a juſter ſenſe of the true principles of chriſtian charity, as well as of ſound policy, have tended to ſoften their rigour; and, though ſtill retained on the ſtatute book, they are moſtly fallen into diſuſe. Thoſe reſpecting

reſpecting proteſtant diſſenters are nearly in a ſtate of perpetual ſuſpenſion by the annual act of indemnity, which is paſſed for the protection of thoſe who may have incurred penalties by breach of the corporation and teſt acts. The particular examination of all theſe laws, creating offences cognizable by the ſuperior juriſdictions, would naturally fall within the ſcope of this treatiſe; yet, by reaſon of their diſuſe, and becauſe I have nothing new to add to what is already in print upon theſe ſubjects, I ſhall content myſelf with mentioning the principal heads, incidentally and briefly noticing ſome regulations of leſs general operation, and referring for the reſt to thoſe treatiſes where this whole code of laws is very perſpicuouſly detailed. And I am the more induced to adopt this method with reſpect to ſuch laws as are principally levelled at diſſenters from the eſtabliſhed church, whether proteſtants or papiſts, ſince their operation is very materially mitigated, and in ſome inſtances wholly done away, by the two principal acts of toleration undermentioned.

Vide 4 Blac Com. ch. 4. & 1 Hawk. ch. 6—16. inclu-ſive, & ch. 18. ſ. 21. & ch. 19.

Exception by toleration acts.

Proteſtant Diſſenters.

By the ſtat. 1 W. & M. c. 18. ſ. 2. emphatically called the Toleration Act, "all perſons diſſenting from the eſtabliſhed church (except papiſts and thoſe who ſhall in preaching or writing deny the doctrines of the Trinity) are exempted from all penal laws relating to religion, except the ſtat. 25 Car. 2. c. 2. (by which all officers of truſt are bound to receive the ſacrament according to the uſage of the church of England, and alſo to take the oaths of allegiance and ſupremacy, and the teſt,—or, being Quakers, make by 8 Geo. 1. c. 6. a ſimilar affirmation); and alſo, except the ſtat. 30 Car. 2. ſt. 2. c. 1. (amended and in part repealed by 2 Geo. 2. c. 31. by which the members of both houſes of parliament are bound to make a declaration againſt tranſubſtantiation, and the invocation of ſaints, and the ſacrifice of the maſs): provided ſuch diſſenters take the oath of allegiance and ſupremacy, and make the abovementioned declaration, and come to ſome congregation for religious worſhip, in ſome place regiſtered either in the biſhop's court, or at the county ſeſſions, the doors whereof ſhall not be locked, barred, or bolted."

1 W. & M. c. 18. ſ. 2. & *vide* 19 Geo. 3 c. 44. 4 Blac. Com. 53.

Toleration of Papiſts.

Alſo by the ſtat. 31 Geo. 3. c. 32. "Perſons profeſſing the popiſh religion, taking the oath of allegiance and abjuration, and making the declaration therein mentioned, ſhall be

31 Geo. 3. c. 32.

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relieved from the penalties and diſabilities of the ſeveral acts (*a*) againſt non-conformiſts, which are the ſubject-matter of moſt of the remainder of this chapter. This new oath and declaration may be taken in any of the courts of Weſtminſter, or at the general quarter ſeſſions of the place where the party ſhall reſide, and ſhall be ſubſcribed by him with his name at length, or his mark, (the name, &c. in the latter caſe to be written by the officer of the court,) and his title, addition, and place of abode; and it ſhall remain in ſuch court of record. And the proper officer of the court ſhall give the party a certificate of ſuch declaration and oath having been duly made, &c. (for which 2 s. and no more ſhall be paid); and ſuch certificate, on proof of the certifier's hand, and that he acted as ſuch officer, ſhall be ſufficient evidence of the fact, unleſs falſified. With a proviſo (ſ. 9.) that all laws made for frequenting divine ſervice on Sundays ſhall be ſtill in force againſt offenders, unleſs ſuch perſons ſhall come to ſome congregation permitted by this act, or by the abovementioned act of the 1 W. & M. c. 18.

The above ſtatutes, founded on the beneficent, wiſe, and juſt principles of toleration, were intended for the protection

(*a*) The acts, or parts of acts, enumerated as conditionally repealed, are the 1 Eliz. c. 2.—23 Eliz. c. 1.—29 Eliz. c. 6.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 4. & 5.—7 Jac. 1. c. 6. in reſpect of not reſorting to the pariſh church, or for keeping any ſervant or other perſon, being a papiſt, who ſhall not ſo reſort: alſo 23 Eliz. c. 1.—27 Eliz. c. 2.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 5.—3 Car. 1. c. 2.—25 Car. 2. c. 2. in reſpect of being a papiſt or reputed papiſt, or profeſſing or being educated in the popiſh religion, or hearing or ſaying maſs, or being a prieſt or deacon, or entering or belonging to any eccleſiaſtical order or community of the church of Rome, or being preſent at or performing any rite, &c. of the popiſh religion, or maintaining or aſſiſting others therein, or teaching or inſtructing youth, not being in either univerſity, &c. or not taking the child of any proteſtant father, &c.: alſo the 1 W. & M. ſtat. 1. c. 9. as to removing papiſts from London and Weſtminſter; and 30 Car. 2. c. 5. as to papiſts adviſedly coming into the king's preſence, &c.

The acts, or parts of acts, abſolutely repealed, are the 1 Eliz. c. 1.—3 Jac. 1. c. 4.—1 W. & M. ſt. 1. c. 8.—1 Geo. 1. ſt. 2. c. 13. and 25 Car. 2. c. 2. touching the tender of the oath of ſupremacy and obedience therein referred to, and of the declaration againſt tranſubſtantiation, and the penalties thereby inflicted upon perſons refuſing or neglecting, upon ſuch tender, to take the oath, and make the ſaid declaration: alſo the acts of the 1 Geo. 1. ſt. 2. c. 55. requiring papiſts to regiſter their names and real eſtates; and 3 Geo. 1. c. 18. and other ſubſequent acts, diſabling them from taking by any deed or will, unleſs regiſtered within a certain time; and the 7 & 8 W. 3. c. 4. and 1 Geo. 1. ſt. 2. c. 13. diſabling them from being barriſters, attornies, &c. provided they take and ſubſcribe the new oath and declaration preſcribed by the ſtatute 31 Geo. 3. c. 32.

of

of conſcientious perſons, who are bonâ fide members of the reſpective congregations ſo regiſtered. But neither will the mere act of regiſtry protect perſons reſorting to ſuch meeting houſes and chapels, unleſs they otherwiſe bring themſelves within the protection of one or other of theſe ſtatutes. Nor will a profeſſed churchman, who has occaſionally attended ſuch meetings, be excuſed on that account from the penalties of not attending his own church.

Rex v. the Juſtices of Derbyſhire, 1 Blac. Rep. 606. Britton v. Standiſh, 6 Mod. 190.

Toleration, however, like other good things, has its boundaries, and is not to be puſhed to the length of giving public encouragement to diſſent from the national eſtabliſhment. In the ſpirit of caution, therefore, the ſtat. 5 Geo. 1. c. 4. has enacted, "That if any mayor, bailiff, or other magiſtrate in England, Wales, Berwick-upon-Tweed, or the iſles of Jerſey or Guernſey, ſhall knowingly or wilfully reſort to or be preſent at any public meeting for religious worſhip, other than the church of England, in the gown or other peculiar habit, or attended with the enſigns belonging to his office, he ſhall be diſabled to hold ſuch office, and adjudged incapable to bear any public office or employment whatſoever within England, Wales," &c.

5 Geo. 1. c. 4. *Diſſenters not to attend meeting with public enſigns.*

2. Derogating from the Book of Common Prayer.

§ 6.

The book of Common Prayer was eſtabliſhed by the ſtat. 2 & 3 Ed. 6. c. 1. and 5 & 6 Ed. 6. c. 1, which being repealed by the ſtat. 1 M. c. 2. was again revived by ſtat. 1 Eliz. c. 2.; and by the latter ſtatute ſ. 4, 5, 6. "If any parſon, vicar, or other miniſter who ought to ſay the ſaid common prayer, &c. (this includes clergymen who have no cure as well as thoſe who have), ſhall refuſe to uſe it in ſuch church, &c. or other place where he ſhould uſe to miniſter the ſame, or wilfully or obſtinately ſtanding in the ſame uſe any other form, or ſpeak any thing in derogation of the ſaid book or any thing therein contained, he ſhall on conviction forfeit for the firſt offence one year's profit of all his ſpiritual promotions, and ſhall ſuffer ſix months impriſonment; and for the ſecond offence ſhall ſuffer one year's impriſonment, and be deprived, &c. and for the third offence be deprived, &c. and impriſoned for life." And by ſ. 7 & 8. if ſuch offender have no ſpiritual promotion, he ſhall for the firſt offence be impriſoned a year, and for the ſecond

1 Eliz. c. 2. *Vide* 1 Hale 328. &c. 1 Hawk. ch. 7. ſ. 3. 3 Bac. Abr. 478. *By miniſters.*

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ſecond be impriſoned for life. The juriſdiction of the eccleſiaſtical court being ſaved, and the ſtatute being only in the affirmative, it does not prevent that court from proceeding againſt ſuch offenders in its own way, even for the firſt offence.

1 Hawk. ch. 7. ſ. 4. *By perſons in general.*

By ſ. 9. &c. of the ſame ſtatute, "If any perſon ſhall in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or deſpiſing of the ſaid book or any part thereof; or by open fact compel or otherwiſe procure or maintain any miniſter to ſay any common prayer openly, &c. in other form; or ſhall by any of the ſaid means unlawfully interrupt or let any miniſter to ſay the ſaid common prayer in manner and form required, he ſhall forfeit 100 marks for the firſt offence, and 400 for the ſecond, &c. (which if he pay not within ſix weeks after conviction, he ſhall ſuffer ſix months impriſonment for the firſt offence, and twelve months for the ſecond); and for the third offence ſhall forfeit all his goods and chattels, and ſhall ſuffer impriſonment for life."

3. Not attending Church and Sacrament.

§ 7. *Statutes.*

In treating of theſe offences I ſhall firſt refer to the ſeveral ſtatutes relative to the ſame. The ſtat. 1 Eliz. c. 2. ſ. 14. enacts, "That all perſons inhabiting within this realm, or any other the queen's dominions, ſhall diligently and faithfully, having no lawful or reaſonable excuſe to be abſent, endeavour themſelves to reſort to their pariſh church or chapel accuſtomed, or upon reaſonable let thereof to ſome uſual place where common prayer and ſuch ſervice of God ſhall be uſed in ſuch time of let, upon every Sunday and other days ordained and uſed to be kept as holidays, and then and there to abide orderly and ſoberly during the time of the common prayer, preaching, or other ſervice of God there to be uſed and miniſtered; upon pain of puniſhment by the cenſures of the church, and alſo upon pain that every perſon ſo offending ſhall forfeit for every ſuch offence 12d. to be levied by the churchwardens of the pariſh where ſuch offence ſhall be done, to the uſe of the poor of the ſame pariſh, of the goods, lands, and tenements of ſuch offender, by way of diſtreſs." S. 17. gives authority to juſtices of oyer and terminer or of aſſize to inquire, hear, and

1 Eliz. c. 2. ſ. 14. *All perſons ſhall reſort to their pariſh church, &c.*

Juriſdiction.

and determine the offences: and by ſ. 20 offenders muſt be indicted at the next general ſeſſions holden before ſuch juſtices next after the offences committed. And by ſ. 24. Puniſhment by the ordinary for any ſuch offence is a bar to a proſecution before the juſtices for the ſame.

Limitation.

The ſtat. 23 Eliz. c. 1. ſ. 5. enacts, That every perſon above the age of 16 years, who ſhall not repair to ſome church, chapel, or uſual place of common prayer, but forbear the ſame, contrary to the former ſtatute of 1 Eliz. being thereof lawfully convicted, ſhall forfeit to the queen for every month he or ſhe ſhall ſo forbear 20l. (*a*); and that over and beſides the ſaid forfeitures, every perſon ſo forbearing for 12 months as aforeſaid ſhall, for their obſtinacy, after certificate thereof in writing made into B. R. by the ordinary of the dioceſe, a juſtice of aſſize and gaol delivery, or a juſtice of peace of the county where ſuch offender ſhall dwell or be, be bound with two ſufficient ſureties in 200l. at leaſt to the good behaviour, and ſo to continue bound until they conform themſelves and come to the church, according to the true meaning of the ſtatute 1 Eliz. c. 2.

23 Eliz. c. 1. ſ. 5. *Vide* 1 Hawk. ch. 10. ſ. 33.

Forfeiture of 20l. per month, &c.

Recognizance with ſureties for good behaviour.

By ſ. 8. Juſtices of the peace, as well as other juſtices named, may inquire of offences within this and the former ſtatute, within one year and a day after ſuch offences committed. And by ſ. 9. Juſtices of oyer and terminer, of aſſize, and of gaol delivery, have power to inquire, hear, and determine offences within this act.

Juriſdiction.

By ſ. 11. Any perſon who ſhall forfeit any ſums of money by virtue of this act, and ſhall fail to pay the ſame within three months after judgment, ſhall be committed to priſon till he have paid the ſaid ſums, or ſhall conform himſelf, or go to church, and there do as is aforeſaid.

Impriſonment on failure of paying forfeiture.

And by ſ. 10. Every perſon guilty of any offence againſt this ſtatute, who ſhall before he be thereof indicted, or at his arraignment or trial before judgment, ſubmit and conform

Cauſes of diſcharge or acquittal.

(*a*) By ſ. 11. One-third to the queen for her own uſe, one-third to the queen for the uſe of the poor (1) of the pariſh where the offence is committed, and one-third to whoever ſhall ſue for the ſame. (Vide 1 Hawk. ch. 10. ſ. 32. &c. as to the diviſion of theſe forfeitures.)

(1) The 29 Eliz. c. 6. ſ. 7. enables the lord treaſurer, &c. to make a further diſtribution of this third.

himſelf

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himſelf before the biſhop of the dioceſe where he ſhall be reſident, or before the juſtices where he ſhall be indicted, arraigned, or tried, (having not before made like ſubmiſſion at any his trial, being indicted for his firſt like offence,) ſhall upon his recognition of ſuch ſubmiſſion in open aſſizes or ſeſſions of the county where ſuch perſon ſhall be reſident, be diſcharged of all and every the ſaid offences againſt this act, and of all pains and forfeitures for the ſame: And ſ. 12. provides, that every perſon who uſually on the Sunday ſhall have in their houſe the divine ſervice eſtabliſhed by law, and be thereat uſually or moſt commonly preſent, and ſhall not obſtinately refuſe to come to church and there do as is aforeſaid, and ſhall alſo four times in the year at leaſt be preſent at divine ſervice in the church of the pariſh where they reſide, or in ſome other open common church or ſuch chapel of eaſe, ſhall not incur any pain or penalty limited by this act for not repairing to church.

Juriſdiction. 29 Eliz. c. 6. 3 Jac. 1. c. 4. ſ 8. *to the like purpoſe.*

The 28 (vulgo 29) Eliz. c. 6. ſ. 2. enacts, That every conviction for any offence before mentioned, (i. e. contrary to the ſtatute of the 23 Eliz. c. 1.) ſhall be in B. R. or at the aſſizes or general gaol delivery, and not elſewhere. Sect. 4. enacts, That every ſuch offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſaid ſtatute, being thereof once convicted, ſhall in ſuch of the terms of Eaſter or Michaelmas as ſhall be next after ſuch conviction pay into the Exchequer after the rate of 20 l. for every month which ſhall be contained in the indictment whereupon ſuch conviction ſhall be; and ſhall alſo for every month after ſuch conviction, without any other indictment or conviction, pay into the Exchequer at two times in the year, viz. in every Eaſter and Michaelmas term, as much as then ſhall remain unpaid, after the rate of 20 l. for every month after ſuch conviction; and in default of payment, proceſs to iſſue out of the Exchequer, &c. to take all the goods and two parts of the lands, tenements, hereditaments, leaſes, and farms of ſuch offender, towards ſatisfaction of the penalties. This payment for every month after the conviction, is by ſ. 6. to be till the party makes ſubmiſſion, and conforms according to the true meaning of the ſtatute 23 Eliz. c. 1. But by ſtat. 3 Jac. 1. c. 4. ſ. 11. the king has an option to wave the monthly forfeiture, and to take two-

Penalties.

Vide infra.

3 Jac. 1. c. 4. ſ. 11.

thirds

thirds of the offender's lands, till the ſaid party, being indicted for not coming to church contrary to former laws, ſhall conform himſelf and come to church, according to the meaning of the ſtatute in that behalf made.

Indictment.

Sect. 5. for the more ſpeedy conviction of ſuch offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſaid ſtatute, (23 Eliz. c. 1.) enacts, That the indictment mentioning the not coming of ſuch offender to the church of the pariſh where ſuch perſon at any time before ſuch indictment was, or did keep houſe or reſidence, nor to any other church, chapel, or uſual place of common prayer, ſhall be ſufficient in law; and that it ſhall not be needful to mention in every ſuch indictment, that the offender was or is inhabiting within England or other the queen's dominions. But if ſuch offender were then not within the realm, &c. he ſhall be relieved by plea in that behalf, and not otherwiſe. And that upon the indictment of ſuch offender, a proclamation ſhall be made at the ſame aſſizes or gaol delivery in which the indictment ſhall be taken, (if the ſame be taken at any aſſizes or gaol delivery,) by which it ſhall be commanded that the body of ſuch offender ſhall be rendered to the ſheriff before the next aſſizes or gaol delivery in the ſame county; and if at the ſaid next aſſizes or gaol delivery the ſame offender ſo proclaimed ſhall not make appearance of record (*a*), then upon ſuch default recorded the ſame ſhall be as ſufficient a conviction (*b*) in law of the ſaid offence whereof the party ſo ſtands indicted, as aforeſaid, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been recorded.

Proclamation to ſurrender.

(*a*) *The party muſt enter his appearance on the record,* 1 Hawk. ch. 10. ſ. 25.

(*b*) *Such conviction, if inſufficient, ſhall be removed into the Exchequer, and there quaſhed; but no writ of error can be brought upon it, as upon a judgment.* 1 Hawk. ch. 10. ſ. 23.

Offender conforming.

Sect. 6. provides, That when ſuch offender ſhall make ſubmiſſion and become conformable, according to the ſtatute 23 Eliz. or ſhall die, then no forfeiture of 20 l. for any month, or ſeizure of lands from and after ſuch ſubmiſſion and conformity, or death, and full ſatisfaction of all arrearages of 20 l. monthly, before ſuch ſeizure due or payable, ſhall enſue or be continued againſt ſuch offender, ſo long as he ſhall continue in coming to divine ſervice according to the intent of the ſaid ſtatute.

Beſides

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Beſides the above proviſions, which are of a general nature, extending to all deſcriptions of perſons, there are alſo other ſtatutes, principally directed againſt popiſh recuſants, which incidentally notice the offence of not attending church, and make regulations in reſpect of the ſame: theſe I ſhall refer to as the ſubject hereafter requires. For the preſent I ſhall only advert to ſome clauſes which contain further general proviſions touching the offence in queſtion.

3 Jac. I. c. 4. ſ. 7. *Juriſdiction.*

The ſtat. 3 Jac. I. c. 4. ſ. 7. enacts, "That the juſtices of aſſize and gaol delivery at their aſſizes, and the juſtices of peace at any of their general or quarter ſeſſions, ſhall, by virtue of this act, inquire, hear, and determine of all recuſants and offences, as well for not receiving the ſacrament aforeſaid, *&c.* as for not repairing to church according to the meaning of former laws, in ſuch manner and form as the ſaid juſtices of aſſize and gaol delivery may now do by former laws in the caſe of recuſancy for not repairing to church; and alſo ſhall have power at their ſaid aſſizes and gaol delivery, and at the ſeſſions (in which any indictment againſt any perſon for not repairing to church according to former laws, &c. *Proclamation.* ſhall be taken) to make proclamation, by which it ſhall be commanded, that the body of every ſuch offender ſhall be rendered to the ſheriff of the ſame county, or bailiff, or other keeper of the gaol of the liberty, before the next aſſizes and general gaol delivery, or before the next general or quarter ſeſſions reſpectively to be holden for the ſaid ſhire, limit, diviſion, or liberty: and if at the ſaid next aſſizes, &c. the offender ſo proclaimed ſhall not make appearance of record, then, on ſuch default recorded, the ſame ſhall be as ſufficient a conviction in law of the ſaid offence whereof the party ſtands indicted as aforeſaid, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been found againſt ſuch offender, and recorded."

Sect. 8. enacts, "That every offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſtatutes in that behalf made, who ſhall be thereof once convicted, *Penalties.* ſhall, in ſuch of the terms of Eaſter and Michaelmas as ſhall be next after ſuch conviction, pay into the Exchequer after the rate of 20l. for every month which ſhall be contained in the indictment whereupon ſuch conviction ſhall be; and ſhall alſo, for every month after ſuch conviction,

without any other indictment or conviction, forfeit 20l. and pay into the Exchequer at two times in the year, viz. in every Eaſter and Michaelmas term, as much as then ſhall remain unpaid, after the rate of 20l. for every month after ſuch conviction; except in ſuch caſes where the king ſhall and may, by force of this act, refuſe the ſame, and take two parts of the lands, tenements, hereditaments, leaſes, and farms of ſuch offender, till the ſaid party, being indicted for not coming to church, contrary to former laws, ſhall conform himſelf and come to church, according to the meaning of the ſtatute in this behalf made." And by ſ. 9. "Every conviction recorded for any offence before mentioned ſhall be certified into the court of Exchequer before the end of the term following ſuch conviction, which ſhall thereupon award proceſs for the ſeizure of the lands and goods of every ſuch offender, as the caſe ſhall require: and if default ſhall be made in any part of the payment aforeſaid, contrary to the form hereinbefore limited, then, and ſo often, the king ſhall and may, by proceſs out of the ſaid Exchequer, take, ſeize, and enjoy all the goods, and two parts as well of all the lands, tenements, and hereditaments, leaſes and farms of ſuch offender, as of all other the lands, tenements, and hereditaments liable to ſuch ſeizure, or to the penalties aforeſaid," &c.

Vide a ſimilar clauſe in 29 Eliz. c. 6. ſ. 4.

By ſ. 16. no indictment againſt any perſon for not repairing to ſome church or chapel, or uſual place of common prayer, but abſenting himſelf for one month, contrary to the laws and ſtatutes in that behalf provided, or for not receiving the ſaid ſacrament, contrary to this law, nor any proclamation, outlawry, or other proceeding thereupon, ſhall be avoided, diſcharged, or reverſed, for any default in form or other defect whatſoever, (other than by direct traverſe to the point of not coming to church or not receiving the ſaid ſacrament whereof ſuch perſon ſhall be indicted,) but the ſame indictment ſhall ſtand in force and be proceeded upon, any ſuch default of form, or other defect whatſoever, notwithſtanding.

Indictment.

Sect. 17. provides, That if any perſon ſo indicted ſhall ſubmit and conform himſelf, and become obedient to the laws of the church of England, and repair to the pariſh church of his moſt abiding, and if there be no ſuch, then to the church next adjoining his ſuch dwelling, and there hear divine ſervice

Indictment reverſed by defendant's conforming.

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ſervice according to the true meaning of the ſtatute in that behalf made, and there publicly receive the ſacrament according to law; then every ſuch perſon ſo indicted ſhall be admitted and allowed to avoid, diſcharge, and reverſe the ſaid indictment and all proceedings thereon, in ſuch manner as if this act had not been made, &c.

Summary proceeding before Juſtices.

Sect. 27. enacts, That if any ſubject ſhall not reſort every Sunday to ſome church, chapel, or other uſual place appointed for common prayer, and there hear divine ſervice according to the ſtat. 1 Eliz. c. 2. it ſhall and may be lawful for any juſtice of the peace of that diviſion, &c. wherein the ſaid party ſhall dwell, on proof of ſuch default by confeſſion, or oath of witneſs, to ſummon the ſaid party; and if he ſhall not make due proof of a ſufficient excuſe, it ſhall be lawful for the ſaid juſtice to give a warrant to the churchwarden of the pariſh where the party dwells, under his hand and ſeal, to levy 12 d. for every ſuch default, by diſtreſs and ſale of the offender's goods, or in default of ſuch diſtreſs to commit ſuch offender to priſon within the ſhire, &c., where he ſhall be inhabiting until payment of the ſum forfeited: the forfeiture to be for the uſe of the poor of the pariſh where the offender reſided at the time of the offence. Sect. 28. provides that nobody ſhall be impeached upon the above clauſe unleſs within one month after ſuch default made. And by ſ. 29. No man puniſhed upon this branch ſhall for the ſame offence be puniſhed by the forfeiture of 12 d. on the ſtat. 1 Eliz. c. 2.

Limitation.

25 Car. 2. c. 2. ſ. 2. *Sacrament.*

By ſtat. 25 Car. 2. c. 2. ſ. 2. All perſons admitted into any civil or military office, or receiving any pay, &c. by patent or grant from his majeſty, or having any command or place of truſt under him, ſhall take the ſacrament according to the uſage of the church of England, within three months after ſuch admittance, in ſome public church, on a Sunday; and by ſ. 3. ſhall obtain a certificate thereof, to be put on record in the court where he takes the oaths of allegiance and ſupremacy by the ſame act required. And by ſ. 4. Any perſon refuſing or neglecting to take ſuch ſacrament, at the place and within the time mentioned, ſhall ipſo facto be adjudged incapable and diſabled in law to have the ſaid office or employment, and the ſame is thereby adjudged void; and ſuch perſon being afterwards convicted

Puniſhment.

of

of executing the ſame, upon any information, preſentment, or indictment in any of the courts of Weſtminſter, or at the aſſizes, ſhall be diſabled to ſue; or to be guardian, or executor, or adminiſtrator; or to be capable of any legacy or deed of gift; or to bear any office in England, Wales, or Berwick-upon-Tweed; and ſhall alſo forfeit 500 l. to be recovered by any informer.

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25 Car. 2. c. 2.

The following conſiderations are to be extracted from theſe acts:

As to the particular Offences deſcribed therein. § 8.

The ſtat. 1 Eliz. c. 2. ſ. 14. requires all perſons having no lawful excuſe for abſenting themſelves, to repair to church, there to abide orderly during the ſervice. The ſtatutes 23 Eliz. c. 1. ſ. 5. 29 Eliz. c. 6. ſ. 2. and 3 Jac. 1. c. 4. ſ. 8. though not ſo fully worded as the ſtat. 1 Eliz. yet may reaſonably be taken to embrace the whole tenor of that ſtatute, to which they have general reference. One who miſbehaves himſelf at church, or goes away without reaſonable excuſe before the ſervice is ended, is as much within the law as one who wholly abſents himſelf. The laſt mentioned ſtatute, as well as the ſtat. 25 Car. 2. c. 2. further extends to perſons not receiving the ſacrament.

Offences deſcribed in the above ſtatutes.

1 Hawk. ch. 10. ſ. 4.

As to the Juriſdictions before which theſe Offences are examinable. § 9.

Offences within the ſtat. 1 Eliz. c. 2. are by ſ. 17. inquirable by juſtices of oyer and terminer, and of aſſize. The ſtat. 23 Eliz. c. 1. ſ. 8. extends the juriſdiction to juſtices of the peace to inquire of offences within that and the former act: and by ſ. 9. juſtices of oyer and terminer, of aſſize, and of gaol delivery, have power to hear and determine offences within that act. The ſtat. 29 Eliz. c. 6. ſ. 2. confined the cognizance of offences within the ſtat. 23 Eliz. c. 1. to B. R. or the aſſizes, or general gaol delivery. But the ſtat. 3 Jac. 1. c. 4. ſ. 7. again gives juriſdiction over all theſe offences, not only to the juſtices of aſſize and gaol delivery, but to juſtices of the peace or ſeſſions, in ſuch manner and form as juſtices of aſſize and gaol delivery might do by former laws. And by ſ. 2. of that ſtatute the penalty of 12 d. given by the ſtat. 1 Eliz.

Juriſdiction.

1 Hawk. ch. 10 ſ. 21.

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may on conviction before one juſtice be levied by his warrant to the churchwardens of the pariſh where the party dwells, provided it be within one month after the offence: but there are no negative words to take away the remedy by indictments

Vide 1 Hawk. ch. 10. ſ. 2. & ſ. 19.

§ 10. *The Limitation of Time for Proſecutions.*

Limitation.

By ſtat. 1 Eliz. c. 2. ſ. 20. offenders muſt be indicted at the next general ſeſſions of the juſtices, therein mentioned, after the offence committed; but by the ſtatute 23 Eliz. c. 1. the offences againſt that and the former ſtatutes of the 1ſt, 5th, and 13th years of the Queen are inquirable within a year and a day after they are committed: The ſtat. 29 Eliz. c. 6., which is in *pari materiâ*, will perhaps be governed by the ſame limitation; and the ſubſequent ſtatute 3 Jac. 1. c. 4. ſ. 7. giving juriſdiction to the juſtices therein named, refers to the mode of proceeding in former laws.

§ 11. *As to the Form of Indictment, or other Mode of convicting Offenders.*

Form of Indictment.
3 Bac. Abr. 479.
1 Hawk. ch. 10. ſ. 2. 24. &c.

The ſtat. 29 Eliz. c. 6. ſ. 5. gives a general and conciſe form of indictment, which is alſo ſufficient in an indictment on the ſtat. 1 Eliz.; and the indictment need not ſhew that the defendant had no reaſonable excuſe for his abſence; but he muſt ſhew that in his own defence. In default of the defendant's appearing, the ſame ſtat. and alſo the ſtat. 3 Jac. 1. c. 4. ſ. 7. give a ſummary mode of conviction, upon proclamation by the ſheriff for his appearing at the next aſſizes, &c., in caſe he ſhall not then appear, and ſuch his default be recorded; in which proceeding the ſtatutes muſt be ſtrictly purſued. The ſtat. 3 Jac. 1. c. 4. ſ. 16. provides, that no indictment for not repairing to church according to the laws in force, or for not receiving the ſacrament contrary to that law, nor any proclamation, outlawry, or other proceeding thereupon, ſhall be reverſed for any defect of form, other than by direct traverſe to the point of not coming to church, or not receiving the ſacrament. But the party is only reſtrained from taking advantage of defects in the record itſelf; for he may plead any collateral matter, ſuch as pardon, &c.; and judgment may be reverſed even for any defect in the record tending to prejudice the king,

1 Hawk. ch. 10. ſ. 28.

king, ſuch as the omiſſion of a capiatur, &c.; and ſo an outlawry may be reverſed for a common defect, on putting in bail, and traverſing the indictment as to the point of not coming to church. The offence need not be alleged in the county where the party was at the time, being a mere non-feazance, and, properly ſpeaking, not committed any where. But proof of abſence from the party's own pariſh church, it is ſaid, is ſufficient to throw the onus upon him of proving where he went to church. Yet this appears to be a ſtrong conſtruction to make on a penal ſtatute, unleſs he were alſo proved to be reſident within his pariſh at the time.

1 Hawk. ch. 10. ſ. 9. 3 Bac. Abr. 477. 1 And. 139. (*Sed vide* Hob. 251.) 1 Hawk. ch. 10. ſ. 4. 5. *and the authorities there cited.*

What Bars or Excuſes may be alleged by Defendants. § 12.

Bars and Excuſes.

By ſ. 24. of the ſtat. 1 Eliz. c. 2. puniſhment by the ordinary is a bar to a proſecution before the juſtices for the ſame offence. The ſtat. 23 Eliz. c. 1. ſ. 5. attaches the offence only on thoſe above 16 years of age; and by ſ. 10. conformity before the biſhop or the juſtices, before judgment for the firſt offence, ſhall be a diſcharge from all pains and forfeitures incurred under that act. In like manner conformity after the ſummary conviction given by the ſtat. 29 Eliz. c. 6. ſhall by ſ. 6. do away ſubſequent forfeitures of 20 l. per month, or ſeizure of lands conſequent thereon, on payment of all arrearages, ſo long as ſuch conformity ſhall continue. So, an indictment for any offence within the ſtat. 3 Jac. 1. c. 4. may by ſ. 17. be avoided by the party's conformity, and receiving the ſacrament. And by the ſame ſtat. ſ. 27, 28, 29. a conviction by one juſtice of peace of offenders within the ſtat. 1 Eliz. c. 2., for not reſorting to church, ſhall operate in bar to the forfeiture given by the ſtat. 1 Eliz. c. 2. And by all theſe ſtatutes the defendant ſhall be diſcharged on ſhewing a reaſonable excuſe for not attending divine ſervice; ſuch as abſence out of the realm by ſtat. 29 Eliz. c. 6. ſ. 5. And ſ. 12. of the ſtat. 23 Eliz. c. 1. ſpecifies what degree of attendance at church within the year ſhall excuſe a party from the pains and penalties of that act. It is ſaid that ſickneſs for part of the time contained in an information ſhall be no excuſe, if it be proved that the defendant was a recuſant both before and after; becauſe it ſhall be preſumed that he obſtinately forbore during that time. This is another inſtance of a harſh conſtruction made

3 Bac. Abr. 479. Cro. Jac. 529. 1 Hawk. ch. 10. ſ. 10.

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on a penal law; more eſpecially as by ſtat. 1 Jac. 1. c. 4. ſ. 2. a recuſant conforming himſelf according to the meaning of the above mentioned ſtatutes of Eliz. ſhall during ſuch conformity be diſcharged of all penalties which he might otherwiſe incur by reaſon of his recuſancy. Such conformity may be pleaded after verdict in an action by a common informer, and even after judgment at the ſuit of the king, if before execution awarded. But after award of execution, or the king has actually taken the profits of the offender's lands, his only remedy is by petition to the king.

1 Jac. 1. c. 4. Okeden v. Keynel, T. Ray. 391. 465. 1 Hawk ch. 10. ſ. 53, 54.

By Toleration Act. Alſo certain deſcriptions of perſons have been altogether taken out of the generality of theſe laws by two principal ſtatutes; namely, proteſtant diſſenters by the ſtat. 1 W. & M. c. 18., and papiſts by the ſtat. 31 G. 3. c. 32. before referred to, upon the conditions therein ſpecified.

Ante, p. 7.

§ 13. *As to the Puniſhment; and where it is determinable by Conformity.*

Puniſhment. 1 Hawk. ch. 10. ſ. 7, 8. 11. 3 Bac. Abr. 480. *Penalties.*

By the ſtat. 1 Eliz. c. 2. ſ. 14. a forfeiture of 12 d. is inflicted, after conviction and judgment, for each particular day's omiſſion in attending church. The ſtat. 23 Eliz. c. 1. ſ. 5. adds 20 l. per month (i. e. lunar month), which is accumulative to the forfeiture by the former ſtatute. Beſides which, by the ſtat. 23 Eliz. any ſuch offender not attending for 12 months, ſhall, after certificate thereof in writing made into B. R., either by the ordinary, or by a juſtice of aſſize, gaol delivery, or of the peace, of the county where the offender lives, be bound to good behaviour, with two ſufficient ſureties in 200 l. at leaſt, until conformity. By ſ. 11., on default of paying within three months after judgment the forfeitures incurred by this act, the offender ſhall be committed till payment or conformity. By ſtat. 29 Eliz. c. 6. ſ. 4. and 3 Jac. 1. c. 4. ſ. 8, 9. the forfeiture of 20 l. per month ſhall be for every month contained in the indictment, and alſo for every month after the conviction (i. e. till the party conforms), except when the king ſhall take the offender's goods and two thirds of his lands, in default of his paying the 20 l. per month, or where the king ſhall elect to take poſſeſſion of two parts of the offender's lands, in lieu of the ſaid penalty (i. e. upon inquiſition found of what lands the party was ſeiſed). And theſe penalties

For the recovery of theſe penalties by action, vide ſt. 35 Eliz. c. 1. ſ. 10.

1 Hawk. ch. 10. ſ. 43. 45.

are to be paid into the Exchequer by the party convicted at ſtated periods. There is a ſimilar proviſion in the ſtat. 3 Jac. 1. c. 4. ſ. 8. whereby the party ſhall forfeit 20l. for every month contained in the indictment on that ſtatute, and at the rate of 20l. for every month after conviction; except when the king ſhall elect to take two parts of the offender's lands. And by ſ. 10 & 11. the ſame election is given to the crown in caſes of conviction on the ſtat. 23 Eliz. c. 1. ſ. 5. And by ſ. 9. of ſtat. 3 Jac. 1. c. 4. in default of payment before the end of the term after conviction recorded, proceſs ſhall iſſue from the Exchequer to ſeize the lands and goods of the offender in the manner therein ſpecified. By ſ. 5. of the ſame ſtatute, where the king takes the defendant's lands on default of his paying the 20l. a month, the profits of them ſhall go towards the ſatisfaction of the penalty. Recuſants of a certain ſtanding are alſo liable to be bound to their good behaviour in the manner pointed out by the ſtat. 2 Eliz. c. 1. ſ. 5.

Recognizance.

It is further enacted by ſtat. 3 Jac. 1. c. 5. ſ. 8. that no recuſant convict ſhall practiſe the common or civil law, or phyſic, or uſe the trade of an apothecary, or be judge, miniſter, clerk, or ſteward in any court, or keep any court, or be regiſtrar or town clerk, or other miniſter or officer in any court, or ſhall bear any office or charge in camp, troop, or company of ſoldiers, or in any ſhip or fortreſs; but ſhall be utterly diſabled for the ſame, and forfeit for every ſuch offence 100l., one moiety to the king, and the other to him who will ſue. And by ſ. 22. ſuch recuſants convicted at the death of any teſtator, or at the time of granting adminiſtration, ſhall be diſabled to be executors or adminiſtrators; and no ſuch perſon ſhall be guardian to any children.

3 Jac. 1. c. 5. ſ. 8. *Vide* 1 Hawk. ch. 12. ſ. 1. &c. *Diſabilities.*

In addition to the above, popiſh recuſants are put by ſeveral ſtatutes under theſe further diſabilities: 1. by ſtat. 3 James 1. c. 5. ſ. 11, 12. that of bringing actions, like perſons excommunicated; 2. that of preſenting to a church by ſtats. 1 W. & M. c. 26. ſ. 4. and 12 Ann. c. 2.; 3. that of bearing any public office or charge by ſtat. 3 James 1. c. 5. ſ. 9.; 4. by the ſame ſtat. ſ. 10. that of claiming any part of a huſband's perſonal eſtate; 5. by the ſame ſtat. ſ. 13. that of claiming an eſtate by curteſy or dower after a marriage againſt law. They are alſo put under theſe reſtraints by ſtats. 35 Eliz. c. 2. and 3 James 1. c. 5.

Vide 1 Hawk. c. 12. *per tot.*

Reſtraints.

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c. 5. ſ. 67. from going above five miles from home unleſs by licence, or by virtue of proceſs; 2. by ſtats. 3 Jac. 1. c. 5. ſ. 2. and 30 Car. 2. ſt. 2. ſ. 5 & 6. from going to court; 3. by ſtats. 3 Jac. 1. c. 5. ſ. 27, 28, 29. and 1 W. & M. c. 15. from keeping arms; 4. from going within 10 miles of London by ſtats. 3 Jac. 1. c. 5. ſ. 4, 5. and 1 W. & M. c. 9. They are alſo liable to theſe forfeitures: 1. by ſtat. 3 Jac. 1. c. 5. ſ. 10. that of two parts of a jointure or dower; 2. by ſtat. 3 Jac. 1. c. 4. ſ. 2, 3. that of 20 l. for not receiving the ſacrament yearly after conformity; 3. by ſtat. 3 Jac. 1. c. 5. ſ. 13. that of 100 l. for an unlawful marriage; 4. by the ſame ſtat. ſ. 14. that of an 100 l. for an omiſſion of lawful baptiſm; 5. by ſ. 15. that of 20 l. for an unlawful burial; laſtly, by ſtat. 3 Jac. 1. c. 5. ſ. 26. their houſes may be ſearched for relicks; and by ſ. 28. if they are married women they are liable to be committed after conviction, &c.

Forfeitures.

Commitment.

14. 4. The next Offence relating to the Church Eſtabliſhment is that of

Maintaining others who ſhall not repair to Church.

3 Jac. 1. c. 4. ſ. 32, 33, 34. *Keeping, &c. others who abſent themſelves from Church.*

The ſtat. 3 Jac. 1. c. 4. ſ. 32, 33, 34. enacts, "that whoſoever ſhall retain or keep in his ſervice, fee, or livery, or ſhall willingly maintain, retain, relieve, keep, or harbour in his houſe any ſervant, ſojourner, or ſtranger, (except a father or mother wanting, without fraud or covin, other habitation or ſufficient maintenance, and alſo except a ward or perſon committed to the cuſtody of another by authority,) who ſhall not go to ſome church or chapel or uſual place of common prayer, to hear divine ſervice, but ſhall forbear the ſame for the ſpace of one month, &c. ſhall for every month that he ſhall keep ſuch ſervant, &c. forfeit 10 l." This is repealed, as to diſſenting proteſtants, by ſuch as bring themſelves within the toleration act; and as to papiſts, by thoſe who bring themſelves within the ſtat. 31 G. 3. c. 32. ſ. 3. The above regulation is alſo enforced, with reſpect to teachers of youth, by the ſtatutes after mentioned.

5. Offences touching Non-conforming Teachers of Schools.

§ 15. *Non-conforming Teachers.*

By ſtat. 23 Eliz. c. 1. ſ. 6 & 7. "If any perſon or perſons, body politic or corporate, ſhall keep or maintain any ſchoolmaſter who ſhall not repair to church according to the form of the ſaid ſtatute, or be allowed by the biſhop or ordinary of the dioceſe (who ſhall not take any thing for the ſaid allowance), they ſhall forfeit for every month 10 l. And ſuch ſchoolmaſter preſuming to teach contrary to the ſaid act, and being thereof convicted, ſhall be diſabled to be a teacher of youth, and ſhall ſuffer impriſonment for one year."

23 Eliz. c. 1. ſ. 6, 7. *Vide* 11 & 12 W. 3. c. 4. ſ. 3. *conditionally repealed by* 18 Geo. 3. c. 60.

The offence is by ſ. 8. inquirable before the ſame juſtices as are before mentioned.

Ante, p. 17.

Alſo by the ſtat. 1 Jac. 1. c. 4. ſ. 9. "No perſon ſhall keep any ſchool or be a ſchoolmaſter, out of the univerſities or colleges of this realm, except it be in ſome public or free grammar ſchool, or in the houſe of one not a recuſant, or where ſuch ſchoolmaſter ſhall be ſpecially licenſed thereunto by the archbiſhop, biſhop, or guardian of the ſpiritualities of that dioceſe; upon pain, that as well the ſchoolmaſter, as alſo the party who ſhall retain or maintain him contrary to the meaning of the ſaid ſtatute, ſhall forfeit each of them, for every day ſo wittingly offending, 40 s., one moiety to the king, the other to him who will ſue for it."

1 Jac. 1. c. 4. ſ. 9.

Theſe ſtatutes are ſtill in force as to perſons not within the toleration act (*a*); but, as to ſuch perſons as are within the latter act, they ſeem to be impliedly repealed by it. And the ſtat. 12 Ann. c. 7. which obliged ſchoolmaſters to ſubſcribe the declaration concerning the liturgy, and to have a licence from the biſhop, is repealed by ſtat. 5 G. 1. c. 4.

3 Bac. Abr. 479. 1 Hawk. ch. 9. ſ. 3.
(*a*) 1 W. & M. c. 18. *enlarged by* 19 G. 3. c. 44.

Alſo by the ſtat. 31 G. 3. c. 32. ſ. 13. "No eccleſiaſtic or other perſon profeſſing the Roman Catholic religion, who ſhall take and ſubſcribe the oath of allegiance, abjuration, and declaration therein mentioned, ſhall be proſecuted in any court whatſoever for teaching and inſtructing youth as a tutor or ſchoolmaſter. Provided (ſ. 14.) that no perſon profeſſing the Roman Catholic religion ſhall obtain or hold the maſterſhip of any college or ſchool of royal foundation, or of any other endowed college or ſchool, or

31 Geo. 3. c. 32. ſ. 13.

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ſhall keep a ſchool in either of the univerſities of Oxford and Cambridge; or (ſ. 15.) ſhall receive into his ſchool for education the child of any proteſtant father. And, provided (by ſ. 16.) that no ſuch perſon ſhall keep ſuch ſchool until his or her name or deſcription, as a Roman Catholic ſchoolmaſter or miſtreſs, ſhall have been recorded at the quarter or general ſeſſion of the peace for the county, &c. where ſuch ſchool ſhall be ſituated, by the clerk of the peace, who ſhall give a certificate thereof to ſuch perſon as ſhall at any time demand the ſame."

The ſtat. 11 & 12 W. 3. c. 4. ſ. 3. which ſubjected to perpetual impriſonment papiſts convicted of keeping ſchool, is repealed by ſtat. 18 G. 3. c. 60. as to perſons taking and ſubſcribing the oath therein recited before arreſt or proſecution. And alſo generally by ſtat. 31 G. 3. c. 32. ſ. 13. as to perſons making and ſubſcribing the oath or declaration thereby required.

§ 16. *6. By giving or receiving foreign Popiſh Education.*

Giving or receiving foreign Popiſh Education.

1 Jac. 1. c. 4. ſ. 6, 7.

By ſtat. 1 Jac. 1. c. 4. ſ. 6, 7. "If any perſon under the king's obedience ſhall go, or ſend, or cauſe to be ſent, any child or any other perſon under their or any of their government, beyond the ſeas, out of the king's obedience, to the intent to enter into, or reſide in, or repair to any college, ſeminary, or houſe of jeſuits, prieſts, or any other popiſh order, profeſſion or calling, to be inſtructed, perſuaded, or ſtrengthened in the popiſh religion, or in any ſort to profeſs the ſame, every ſuch perſon ſo ſending ſuch child, &c. ſhall forfeit 100 l., and the parties alſo incur certain diſabilities."

3 Jac. 1. c. 5. ſ. 16.

And by ſtat. 3 Jac. 1. c. 5, ſ. 16. "If the children of any ſubject within the realm, (the ſaid children not being ſoldiers, mariners, merchants, or their apprentices or factors,) ſhall be ſent or go beyond ſea, to prevent their good education in England, or for any other cauſe, without the licence therein required, the party ſending ſuch child &c. ſhall forfeit 100 l., and the child incurs certain diſabilities in the mean time."

3 Car. 1. c. 2.

Alſo by ſtat. 3 Car. 1. c. 2. "If any perſon under the king's obedience ſhall go, or ſhall convey or ſend, or cauſe to be ſent or conveyed, out of the king's dominions, any perſon into any parts beyond the ſeas, out of the king's obedience, to the intent

intent to enter into, or be reſident, or trained up in any priory, abbey, nunnery, popiſh univerſity, college, or ſchool, or houſe of jeſuits, prieſts, or in a private popiſh family, and ſhall be there by any popiſh perſon inſtructed, perſuaded, or ſtrengthened in the popiſh religion in any ſort to profeſs the ſame, or ſhall convey or ſend, or cauſe to be conveyed or ſent, any thing towards the maintenance of any perſon ſo going or ſent, and trained and inſtructed as aforeſaid, or under colour of any charity towards the relief of any priory, &c. or religious houſe whatſoever, every perſon ſo ſending, &c. any ſuch perſon or thing, and every perſon paſſing or ſent, being thereof convicted, &c. ſhall forfeit all his goods and chattels, and alſo all his hereditaments offices and eſtates of freehold during his life;" beſides incurring certain other diſabilities. And the contributing to the maintenance of any jeſuit, ſeminary prieſt, &c. or of any popiſh ſeminary out of the realm, is made a præmunire by ſtat. 27 Eliz. c. 2. ſ. 6. And by ſ. 5. of the ſame ſtat. "If any ſubject, not being an eccleſiaſtic, and brought up in any popiſh ſeminary beyond ſeas, ſhall not, within ſix months after a proclamation to that purpoſe in London, under the Great Seal, return into this realm, and within two days after ſubmit, &c. and take the oath required, he ſhall be guilty of high treaſon whenever he ſhall otherwiſe return." 25 Car. 2. c. 2. ſ. 8.

By ſtat. 25 Car. 2. c. 2. ſ. 8. "If any perſons not bred by their parents from their infancy in the popiſh religion, and profeſſing themſelves to be popiſh recuſants, ſhall inſtruct or educate, or ſuffer to be inſtructed or educated, their children in the popiſh religion; every ſuch perſon on conviction ſhall be diſabled from bearing any office or place of truſt or profit in church or ſtate; and ſuch children ſhall alſo be thus diſabled until they conform, and take the oaths of ſupremacy and allegiance, and receive the ſacrament after the uſage of the church of England, and obtain a certificate thereof under the hands of two or more juſtices of the peace: and (by ſ. 9.) ſhall make and ſubſcribe the declaration againſt tranſubſtantiation."

Perſons profeſſing the popiſh religion are alſo laid under many diſabilities by various ſtatutes, moſt of which have been before alluded to, and which being fully explained in other treatiſes are not neceſſary to be here detailed; eſpecially as ſuch perſons are now protected by bringing themſelves within the act of the 31 Geo. 3. c. 32. *Vide* 1 Hawk. ch. 15. and 4 Blackſt. Comm. ante, p. 21, 22.

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7. Another Offence againſt the Eſtabliſhed Church, by encouraging the Popiſh Religion, is

The iſſuing of Popiſh Books, Relicks, and the like.

§ 17. *Iſſuing Popiſh Books, &c.* 3 & 4 Ed. 6. c. 10.

As to which, by ſtat. 3 & 4 Ed. 6. c. 10. all primers (and other popiſh books enumerated), or other books or writings whatſoever theretofore uſed for the ſervice of the church, other than ſuch as ſhall be ſet forth by the king, are aboliſhed and forbidden to be uſed or kept in this realm or elſewhere within any the king's dominions. And by ſ. 2. all perſons are forbidden to have ſuch books in their cuſtody; and every perſon ſhall, for every ſuch book willingly retained in his cuſtody within any of the king's dominions, forfeit on conviction for the firſt offence 20s., for the ſecond offence 4l., and for the third offence ſuffer impriſonment at the king's will. And by ſ. 4. juſtices of aſſize and of the peace have authority to hear and determine theſe offences. And by ſ. 3. half the forfeitures are to go to the crown, and half to whoever will ſue for the ſame.

13 Eliz. c. 2. ſ. 7.

By ſtat. 13 Eliz. c. 2. ſ. 7. "if any perſon ſhall bring into this realm or any the dominions of the ſame any thing called agnus Dei, or any croſſes, pictures, beads, or ſuch like ſuperſtitious things, from the biſhop or ſee of Rome, or from any perſon claiming authority from the ſame to conſecrate ſuch things; and if any perſon ſo bringing in ſuch things ſhall deliver, or cauſe, or offer the ſame to be delivered to any ſubject to be worn or uſed, as well the perſon doing as the perſon receiving the ſame, to the intent to uſe or wear the ſame, on conviction and attainder ſhall incur a præmunire. Any perſon to whom ſuch things are offered may, (by ſ. 8.) indemnify himſelf by apprehending the party offering the ſame, or within three days after the offer made diſcloſing his name and place of abode to a juſtice of peace, or delivering up the thing received within one day. And by (ſ. 10.) If any juſtice of peace to whom the ſaid offences ſhall be declared do not within fourteen days after ſignify the ſame to ſome privy counſellor, he ſhall incur a præmunire."

3 Jac. 1. c. 5. ſ. 25.

By ſtat. 3 Jac. 1. c. 5. ſ. 25. "no perſon ſhall bring from beyond the ſeas, nor ſhall print, buy, or ſell any popiſh primer, ladies' pſalters, manuals, roſaries, popiſh catechiſms, miſſals, breviaries, poſtals, legends, and lives of ſaints, containing ſuperſtitious

ſuperſtitious matter, printed or written in any language whatſoever, nor any other ſuperſtitious books printed or written in Engliſh, on pain of forfeiting 40s. for every ſuch book, one-third to the king, one to the informer, and one to the poor of the pariſh; and the books to be burnt."

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8. Another Offence of the ſame Deſcription is § 18.

The ſaying or hearing Maſs or other Popiſh Service.

By ſtat. 23 Eliz. c. 1. ſ. 4. "Every perſon who ſhall ſay or ſing maſs, being thereof lawfully convicted, ſhall forfeit 200 marks, and be committed to the next gaol for one year, and till payment: and every perſon who ſhall willingly hear maſs ſhall forfeit 100 marks, and ſuffer a year's impriſonment." But conformity will remit the puniſhment in the manner already deſcribed.

Saying or hearing Popiſh ſervice. 23 Eliz. c. 1. ſ. 4.

Ante, p. 19.

And by ſtat. 3 Jac. 1. c. 5. ſ. 1. "Any perſon diſcovering to a juſtice of peace the ſaying of a maſs, and any of the perſons who were preſent at it, within three days afterwards, by reaſon whereof any offender is convicted or attainted, ſhall be indemnified, and have a third of the forfeiture, or 50l. if the forfeiture exceed 150l."

3 Jac. 1. c. 5. ſ. 1. *Indemnity to Perſons diſcovering.*

By ſtat. 11 & 12 W. 3. c. 4. ſ. 3. "Every popiſh biſhop, prieſt, or jeſuit proſecuted to conviction for exerciſing any part of his function, (except (ſ. 5.) he be a foreigner entered in the ſecretary of ſtate's office, and officiate only in the houſe of a foreign miniſter,) ſhall be adjudged to perpetual impriſonment in ſuch place as the king in council ſhall appoint." But this ſeverity is now in effect done away by the acts of the 18 Geo. 3. c. 60. and 31 Geo. 3. c. 32. ſ. 4., in reſpect to perſons of this perſuaſion taking the oaths, and ſubſcribing the declarations therein reſpectively contained.

11 & 12 W. 3. c. 4. *Popiſh Prieſts convict.*

9. Another and very principal Offence againſt the Church Eſtabliſhment, connected alſo with the State, is § 19.

The not taking the Oaths of Allegiance and Supremacy, and making the Declaration againſt Popery.

By the act of the 1 Eliz. c. 1. all ancient eccleſiaſtical juriſdictions were reſtored and united to the crown, and its ſupremacy in ſuch matters was finally aſſerted and eſtabliſhed; and an oath to that effect appointed to be taken by

Not taking the Oaths, &c. 1 Eliz. c. 1. ſ. 12.

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by all officers and miniſters eccleſiaſtical and civil, on pain, in caſe of refuſal, of the party forfeiting for life every promotion benefice and office, ſpiritual and temporal, which he had at the time of ſuch refuſal, and being diſabled from taking any ſuch preferment to which he was then promoted. This oath was abrogated by the ſtat. 1 W. & M. c. 8., and another appointed to be taken in lieu of it under the ſame penalties. By ſ. 37. of the ſaid ſtat. of Eliz. the offence muſt be proved by two witneſſes at leaſt.

ſ. 20, 21.

5 Eliz. c. 1. ſ. 5. Vide 1 Hawk. ch. 19. ſ. 28. &c.

All perſons required by the ſtat. 1 Eliz. c. 1. to take the ſaid oath, and all ſchoolmaſters and public and private teachers, barriſters, benchers, readers, ancients in any houſe of court, &c. attornies, ſheriffs, and officers belonging to the common or any other law, or to the crown, or to any court whatever, ſhall, by ſtat. 5 Eliz. c. 1. ſ. 5., take the ſaid oath in open court before they ſhall be admitted to any ſuch vocation or office, &c.; and if they belong not to any court, then they ſhall take the ſame before ſuch perſon as ſhall admit them to ſuch vocation, &c. or before commiſſioners appointed under the great ſeal, &c.

ſ. 6.

By ſ. 6. any biſhop may tender the ſaid oath to any ſpiritual perſon within his dioceſe, as well in places exempt as others; and by ſ. 7. commiſſioners may be appointed by the Lord Chancellor to tender the ſame to ſuch perſons as by their commiſſion they ſhall be authoriſed to do. And by ſ. 8. if any perſon compellable by either of the ſaid acts, or appointed by ſuch commiſſioners to take the ſaid oath, ſhall refuſe to take it on a tender thereof, he ſhall incur a præmunire. And by ſ. 9. ſuch refuſal ſhall be certified within 40 days if in term, or otherwiſe at the firſt day of the full term next following the 40 days, into B. R. by the perſons having authority to tender ſuch oath, under the penalty of 100l.; and the ſheriff of the county where the court ſit may impanel a jury to inquire of ſuch refuſal, in ſuch manner as if it had happened in the ſame county; which jury may, upon ſuch certificate and other evidence, indict the offender in ſuch ſort as if the offence had been done in the ſame county. But though ſuch a jury may find the indictment, ſtill it is ſaid, that the *trial* muſt be by a jury of that county wherein the oaths were refuſed.

2 Hawk. ch. 19 ſ. 35. Dy. 234.

30 Car. 2 ſt. 2. c. 1. & 1 Geo. 1. ſt. 2. c. 1.

By ſtat. 30 Car. 2. ſtat. 2. c. 1. and 1 Geo. 1. ſtat. 2. c. 1. ſ. 16, 17. & 22. "No peer or member of the Houſe of Peers

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Peers ſhall vote, or make his proxy, or ſit there during any debate; and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen; until ſuch peer or member ſhall take the oaths of allegiance and ſupremacy, and make a declaration (therein ſpecified) of his belief that there is no tranſubſtantiation in the ſacrament of the Lord's Supper, and that the invocation or adoration of the Virgin Mary, or any other ſaint, and the ſacrifice of the maſs, as they are now uſed in the church of Rome, are ſuperſtitious and idolatrous, &c. on pain that every ſuch offender ſhall be adjudged a popiſh recuſant convict, and diſabled to hold or execute any office, &c. or from thenceforth to ſit or vote in either houſe of parliament, or to ſue in law or equity, or to be guardian, executor, or adminiſtrator, or capable of any legacy or deed of gift, and ſhall forfeit for every ſuch wilful offence 500 l."

By members of parliament.

Repealed as to ſuch papiſts who bring themſelves within the 31 G. 3. c. 32. ſ. 20.

The 9th, 12th, and 13th clauſes of the ſame ſtatute, which require that "Every ſworn ſervant to the king ſhall take the ſaid oaths, and make and ſubſcribe the ſaid declaration," are repealed by the ſtat. 2 Geo. 2. c. 31. ſ. 9.

By Perſons holding places at court.

By ſtat. 1 W. & M. c. 9. "Every juſtice of peace in London and Weſtminſter, and within ten miles thereof, ſhall cauſe to be arreſted and brought before him all reputed papiſts, (except foreigners, being merchants or menial ſervants to ſome ambaſſador or public agent, &c.) and ſhall tender the above mentioned declaration to every ſuch perſon; and every ſuch perſon refuſing the ſame, and afterwards remaining within the above limits, or being certified by juſtices out of thoſe limits to B. R. or the quarter ſeſſions for ſuch refuſal, and neglecting to make the ſaid declaration in ſuch court, ſhall ſuffer as a popiſh recuſant convict." Suppoſed papiſts required by two juſtices of peace to make the ſaid declaration, and neglecting ſo to do, are, by ſtat. 1 W. & M. c. 15., reſtricted in the privilege of keeping arms, ammunition, and horſes at their pleaſure; And by ſtat. 1 W. & M. c. 26. from preſenting to any benefice. And by the land-tax acts papiſts in general are liable to pay double land-tax if they do not conform. But now, by 31 Geo. 3. c. 32. ſ. 18., no papiſt making and ſubſcribing the oath and declaration therein contained ſhall be proſecuted on the former ſtatutes.

By perſons living within ten miles of London. 1 W. & M. c. 9. 31 G. 3. c. 32. ſ. 19. *proteſts thoſe who bring themſelves within that ſtat.*

Vide ſupra.

Alſo

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Alſo by ſtat. 7 & 8 W. 3. c. 24. any ſerjeant or counſellor at law, barriſter, advocate, attorney, ſolicitor, proctor, clerk, or notary, practiſing as ſuch in any court whatſoever, not having before taken, in the court of Chancery, or King's Bench, or quarter ſeſſions of the county wherein he lives, the oaths required by the ſtat. 1 W. & M. c. 8., and made and ſubſcribed the declaration appointed by the ſtat. 25 Car. 2. c. 2. (to prevent danger from popiſh recuſants) ſhall incur a præmunire. This, ſo far as reſpects Roman Catholics, is repealed by ſtat. 31 Geo. 3. c. 32. ſ. 22., as to ſuch as bring themſelves within the ſame.

7 & 8 W. 3. c. 24. *By Barriſters, &c.*

By ſtat. 7 & 8 W. 3. c. 27. any perſon refuſing to take the ſaid oaths of allegiance and ſupremacy when tendered, or refuſing or neglecting to appear, when lawfully ſummoned, in order to have the ſaid oaths tendered to him, ſhall, until he ſhall have taken the ſame, incur all the pains and penalties of popiſh recuſants convict: and the perſon ſo tendering the ſaid oaths ſhall, on every ſuch refuſal or default, record and enter in parchment the chriſtian and ſurname and place of abode of the party, together with the time of tender and refuſal or default, and ſhall certify the ſaid record or entry to the juſtices of aſſize, oyer and terminer or gaol delivery at their next ſeſſion, who ſhall eſtreat and certify the ſame into the court of Exchequer, who may award ſuch proceſs againſt the lands and goods of the party as in the caſe of a popiſh recuſant convict. By ſ. 12. quakers, who ſcruple to take an oath, may make a declaration of fidelity to the ſame effect.

c. 27. *Tenor of Oaths.*

The ſtat. 1 Geo. 1. ſt. 2. c. 13. gives the form of the oaths of allegiance and abjuration required to be taken by all officers civil and military, and all eccleſiaſtical perſons, and members of colleges (being of the age of eighteen years), and by all teachers or readers in any univerſity or elſewhere, and by all ſchoolmaſters and uſhers, and all teachers and preachers of ſeparate congregations, all conſtables, ſerjeants at law, counſellors, barriſters, advocates, attornies, ſolicitors, proctors, clerks, or notaries, practiſing in any court; which oaths are to be taken within three (by 9 Geo. 2. c. 26. ſ. 4. *ſix*) months after they have been admitted into or entered upon any ſuch preferment, benefice, office, or place, or come into ſuch capacity, or taken upon themſelves ſuch em-

1 Geo. 1. ſt. 2. c. 13. *Form of Oath of Allegiance and Abjuration.*

ployment, practice, or buſineſs in one of the courts at Weſtminſter, or at the quarter ſeſſions of the county where they reſide, under pain of diſability to hold or exerciſe the ſaid offices, &c. upon neglect or refuſal to take the ſaid oaths. And perſons convicted in any of the courts at Weſtminſter, or at the aſſizes, of exerciſing ſuch offices or employments without taking the oaths within the time ſpecified, ſhall be diſabled to ſue, or to be guardian, or executor, or adminiſtrator, or capable of any legacy or deed of gift, or to be in any office within Great Britain, or to vote for members of parliament; and ſhall forfeit 500l., to be recovered by any informer. And by ſ. 10. two juſtices, or other perſons ſpecially commiſſioned, may tender the ſaid oaths to any perſon whom they ſuſpect to be dangerous or diſaffected to his majeſty or his government, and on their neglect or refuſal to take the ſaid oaths, may certify the ſame to the next quarter ſeſſions; which being there recorded, ſhall be from thence certified by the clerk of the peace into the courts of Chancery or King's Bench; and every perſon ſo neglecting or refuſing to take the ſaid oaths ſhall, from the time of his neglect or refuſal, be adjudged a popiſh recuſant convict, and as ſuch to forfeit and be proceeded againſt. The ſame puniſhment is denounced by ſ. 11. againſt ſuch as, being lawfully ſummoned to appear and take the oaths, neglect or refuſe to do ſo. Theſe proviſions, ſo far as they reſpect the ſummoning perſons to take the oaths of ſupremacy and make the declaration againſt tranſubſtantiation, required by the ſtat. 25 Car. 2. c. 2., are repealed by ſtat. 31 Geo. 3. c. 32. ſ. 18.

ſ. 7.
ſ. 8.

Tender of Oath to ſuſpected perſons.

By ſ. 16 & 17 of the ſame ſtat. of Geo. 1. no peer of this realm, or member of the Houſe of Peers ſhall vote, or make his proxy, or ſit there during any debate, and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen, until ſuch peer or member ſhall have taken the abjuration oath thereby required, together with the oaths of allegiance and ſupremacy, and the declaration againſt tranſubſtantiation; on pain of being diſabled to ſue, or be a guardian, or executor, or adminiſtrator, or capable of any legacy, or deed, or gift, or to be in any office within Great Britain, or to vote at any election for members to ſerve in parliament, and of forfeiting 500l., to be recovered by any informer. By ſ. 20. this diſability

Peers and members of parliament.

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diſability is not to extend to the offices of tithingman, headborough, overſeer of the poor, churchwarden, ſurveyor of the highways, or any like inferior civil office, or to any office of foreſter, or keeper of any park, or other inferior or private officers therein mentioned. By ſ. 22. perſons obliged by any law to receive the ſacrament, or make the declaration againſt tranſubſtantiation, ſhall continue bound to do ſo.

§ 20. 10. *Extolling or maintaining the Authority of the Pope or the See of Rome.*

Maintaining the Pope's authority. 5 Eliz. c. 1. ſ. 2. 10. Vide 1 Hawk. ch. 17. ſ. 72, 73, 74.

By ſtat. 5 Eliz. c. 1. if any perſon within the queen's dominions ſhall, by writing, cyphering, printing, preaching, or teaching, deed or act, adviſedly and wittingly hold or ſtand with, to extol, ſet forth, maintain, or defend the juriſdiction or power of the biſhop or ſee of Rome, heretofore claimed, uſed, or uſurped in this realm, or any dominion or country under the queen's obedience; or by any ſpeech, open deed or act, wittingly and adviſedly attribute any ſuch juriſdiction, authority, or pre-eminence to the ſaid ſee or biſhop of Rome within this realm, or in any of the queen's dominions, he, his abettors, procurers, aiders, aſſiſters, and comforters therein ſhall be guilty of a præmunire for the firſt offence, and of high treaſon for the ſecond; but without corruption of blood or loſs of dower. The firſt proſecution muſt be commenced within one year after the offence committed.

§ 21. 11. *Putting in Ure Popiſh Bulls, Proceſs, &c.*

Uſing Popiſh Bulls, &c. 13 Eliz. c. 2. ſ. 2, 3.

By ſtat. 13 Eliz. c. 2. ſ. 2, 3. "if any perſon ſhall put in ure, within this realm or any the queen's dominions, any bull or inſtrument of abſolution or reconciliation, obtained from the biſhop or ſee of Rome, or any perſon claiming authority therefrom, or ſhall take upon him, by colour of ſuch bull, &c. to abſolve or reconcile any perſon, or to grant or promiſe to any perſon within this realm, or other the queen's dominions, any abſolution or reconciliation, by any ſpeech, preaching, teaching, writing, or any other open deed, or ſhall willingly receive any ſuch abſolution or reconciliation, or ſhall obtain from the biſhop or ſee of Rome any bull or writing whatſoever, containing any thing, matter,

ter, or cauſe whatſoever, or publiſh or any ways put the ſame in ure, he, his procurers, abettors, and counſellors to the fact ſhall be guilty of high treaſon." By ſ. 4. acceſſaries after the offence incur a præmunire; and by ſ. 5, 6. ſuch as do not, within ſix weeks, diſcloſe an offer of ſuch bulls, &c. to ſome privy counſellors, &c. are guilty of a miſpriſion of treaſon.

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There are many other obſolete laws againſt papal proviſions, inſtruments, and proceſſes, as applicable to particular caſes, which ſubject the offenders only to the penalties of a præmunire.

Vide 1 Hawk. ch. 19. ſ 12. &c

12. *Perverting others or being perverted to Popery.*

By ſtat. 23 Eliz. c. 1. ſ. 2. and 3 Jac. 1. c. 4. ſ. 22, 23. "If any one ſhall pretend to have power, or ſhall put in practice to abſolve, perſuade, or withdraw a ſubject from his natural obedience to the queen, or to withdraw him *for that intent* to the Romiſh religion, or to move him to promiſe any obedience to any pretended authority of the ſee of Rome or any other ſtate, &c. to be uſed within the dominions of the queen, or to do any overt act to that intent; and if any perſon ſhall, by any means, be willingly abſolved or withdrawn, or willingly be reconciled or promiſe ſuch obedience as aforeſaid, he, his procurers and counſellors, ſhall be guilty of high treaſon. By ſ. 3. acceſſaries after, not diſcloſing their principals within 20 days, ſhall be guilty of miſpriſion of treaſon. But by the latter ſtatute (ſ. 24.) if any perſon who is reconciled to the ſee of Rome, beyond the ſeas, return into the realm and ſubmit himſelf, &c. and take the oaths within ſix days after his return, he is excuſed.

§ 22. *Converſion to Popery.* 23 Eliz. c. 1. 3 Jac. 1. c. 4. *Vide* 1 Hawk. ch. 17. ſ. 76, 77, 78. and poſt. tit. High Treaſon, § 33.

13. *Natural born Subjects ordained or profeſſed by Popiſh Authority, being in the Realm, without ſubmitting themſelves.*

By ſtat. 27 Eliz. c. 2. ſ. 3. "If any eccleſiaſtic, born in the queen's dominions, and made, ordained, or profeſſed by popiſh authority, ſhall come into, be, or remain in the queen's dominions, and not ſubmit to ſome biſhop or juſtice of the peace, within three days, and take the oaths, &c. he ſhall be guilty of high treaſon. By ſ. 13. if any ſubject

§ 23. *Popiſh Prieſts abiding here.* 27 Eliz. c. 2. *Vide* 1 Hawk. ch. 17. ſ. 82, 3.

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ſhall know that any ſuch prieſt is within the realm, and not diſcover him to ſome juſtice of peace, &c. within 12 days, he ſhall be fined and impriſoned at the queen's will; and if any juſtice of peace, &c. to whom ſuch matters ſhall be diſcovered, ſhall not give information to ſome of the privy council, &c. within 28 days after, he ſhall forfeit 200 marks.

This ſtatute ſeems to be proviſionally repealed by the 4th ſect. of the ſtat. 31 Geo. 3. c. 32. in reſpect of ſuch as take the oath of allegiance, abjuration, and declaration therein mentioned.

14. *Relieving Popiſh Prieſts.*

§ 24. *Relieving Popiſh Prieſts.* 27 Eliz. c. 2. ſ. 4. *Vide* 1 Hale, 621.

By ſtat. 27 Eliz. c. 2. ſ. 4. "Whoever ſhall wittingly and willingly receive, relieve, comfort, aid, or maintain any jeſuit, ſeminary or other popiſh prieſt, &c. being at liberty or out of hold, knowing him to be a jeſuit, &c. ſhall be adjudged a felon, without benefit of clergy."

15. *Refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhoprick.*

§ 25. *Rejecting the Nomination of the Crown to a Biſhopric.*

This offence, not likely to be now committed, againſt our church eſtabliſhment and diſcipline is one which grew out of the Reformation; before the ſupremacy of the crown in ſpiritual concerns had become as rooted in conſcience as in law.

25 H. 8. c. 20. ſ. 7.

By ſtat. 25 H. 8. c. 20. ſ. 7. "If any dean and chapter refuſe to elect the perſon named in the king's letter for a biſhoprick, and to ſignify ſuch election to the king within 20 days after the licence to elect ſhall come to their hands; or if any archbiſhop or biſhop, after ſuch election, or nomination by the king in default thereof, ſignified unto him by the king, ſhall refuſe, within 20 days, to confirm and conſecrate the perſon ſo ſignified to him, he ſhall incur a præmunire.

16. *Appointing Aliens to Church Preferment.*

§ 26. *Preferring Aliens in the Church.* 7 Ric. 2. c. 12.

The ſtat. 7 Ric. 2. c. 12. reciting, that by the ſtat. 27 Ed. 3. no perſon ſhall take or receive procuracy, letter of attorney, nor any other adminiſtration, by indenture or in any other manner, of any perſon, concerning any benefice of

of holy church within the realm, but only of the king's ſubjects of the ſame realm, without the king's licence, under the pains therein mentioned, confirms the ſame; and enacts, that if any alien ſhall purchaſe any benefice of holy church, dignity, or other thing, and take poſſeſſion of the ſame, whether for his own or another's uſe, without ſuch licence, he ſhall be compriſed in the ſaid ſtat., and alſo incur the pains and penalties of the ſtat. 25 Ed. 3. ſt. 5. c. 22.

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17. *Exerciſing the Juriſdiction of Suffragan without due Appointment.*

By ſtat. 26 H. 8. c. 14. No ſuffragan ſhall uſe any juriſdiction, ordinary or epiſcopal power, otherwiſe nor for longer time than ſhall be limited by the commiſſion granted by the archbiſhop or biſhop of the dioceſe, under the authority of that act, under the penalty of a præmunire.

§ 27. *Acting as Suffragan without Authority.* 26 H. 8. c. 14. ſ. 6.

18. *Simony.*

No offence under this title was known to the common law; and yet the corrupt preſentation to a benefice is ſaid to have been ſuch an offence, whereof the law would take notice even before the ſtat. 31 Eliz. c. 6.; and this is confirmed by what is ſaid in the ſtat. 1 W. & M. ſt. 1. c. 16. which provides, that no innocent incumbent or patron ſhall be prejudiced under pretence of lapſe by virtue of the ſimoniacal preſentation of the former incumbent, "unleſs the perſon ſimoniacally preſented, or his patron, were *convicted of ſuch offence at the common law*, or ſome eccleſiaſtical court, in the lifetime of the perſon ſimoniacally promoted." The ground of ſuch an offence at common law muſt be the abuſe of a great public truſt from corrupt motives.

§ 28. *Simony.* The Biſhop of St. David v. Lucy, 1 Ld. Raym. 449. Barret v. Glubb, 2 Blac. R. 1054. Oldbury v. Gregory, Moor, 564. 6 Bac. Abr. 185. Mackaller v. Tadderick, Cro. Car. 361.

The ſtat. 31 Eliz. c. 6. for avoiding ſimony and corruption in preſentations to benefices and other eccleſiaſtical promotions, enacts, ſ. 5. That if any perſon, bodies politic and corporate, ſhall, for any money, reward, gift, profit, or benefit, directly or indirectly, or by reaſon of any promiſe, agreement, bond, or other aſſurances for any money, &c. directly or indirectly, preſent or collate any perſon to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, or give or beſtow the ſame for any ſuch corrupt cauſe or conſideration; then every ſuch preſentation, &c. thereupon

31 Eliz. c. 6. ſ. 5.

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ſhall be utterly void; and it ſhall be lawful for the crown to preſent, collate unto, or beſtow every ſuch benefice, &c. for that one turn only. And that every perſon, bodies politic and corporate, that ſhall give or take any ſuch ſum of money, reward, &c. directly or indirectly, or that ſhall make or take any ſuch promiſe, bond, &c. or other aſſurance, ſhall forfeit and loſe the double value of one year's profit of every ſuch benefice, &c.; and the perſon ſo corruptly taking, procuring, ſeeking, or accepting any ſuch benefice, &c. ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have or enjoy the ſame benefice, dignity, prebend, or living eccleſiaſtical.

Cro. Jac. 533. In the caſe of Booth v. Potter it was holden, that the party ſo ſimoniacally promoted could never be preſented to the ſame benefice again.

Other proviſions are made and penalties given by the ſame act in furtherance of the like purpoſe.

12 Ann. c. 12. This proviſion has been followed up by the ſtat. 12 Ann. c. 12. ſ. 2. whereby, "if any perſon ſhall, for any money, reward, or advantage, &c. directly or indirectly, or by reaſon of any promiſe, agreement, bond, &c. or other aſſurance for any money, &c. directly or indirectly, in his own or any other perſon's name, take, procure, or accept the next avoidance of or preſentation to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, and ſhall be preſented or collated thereupon, every ſuch preſentation or collation, &c. ſhall be void, and ſuch agreement be deemed a ſimoniacal contract, and the crown may preſent or collate for that turn; and the perſon ſo corruptly taking, procuring, or accepting any ſuch benefice, &c. ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have the ſame benefice, &c."

By both ſtatutes the offenders ſhall alſo be liable to be puniſhed by the eccleſiaſtical laws.

CHAP. II.

OF HIGH TREASON;

AND OTHER INCIDENTAL OFFENCES

Immediately againſt the Allegiance due to the King.

Definition of High Treaſon.

Diſtinguiſhable from Sedition. - - § 1.

ALLEGIANCE:

1. *What it imports.* - - § 2.

2. *From whom required.* - - § 3.

Natural born Subjects. - - § 3.

Oaths of Allegiance to be taken by ſuch under Penalties. - - - - § 3.

Foreigners. - - - § 4.

3. *To whom due.* - - - § 5.

Not to Huſband of Queen regnant. - § 5.

King de facto or de jure. - - § 5.

Acts for ſettling the Succeſſion to the Crown. § 5.

4. *What Breaches of Allegiance amount to High Treaſon, or other leſs Offence.* § 6.

The Statute of Treaſons, 25 Ed. 3. ſt. 5. c. 2. and other ſubſequent Statutes, ending with 36 Geo. 3. c. 7. - - - § 6.

I. *Compaſſing or imagining the Death of the King.* - - - § 7.

The Compaſſing, &c. is the Treaſon laid: the Overt Acts charged in Indictment as the Means or Evidence. - - - § 7.

Overt Acts of Compaſſing, &c. - - § 7.
Actual killing. *ib.* Preparing Means of Death. § 7. Conſulting on it. *ib.* Entering into Meaſures for depoſing or taking Poſſeſſion of the King or Government. § 8. Subverting Parliament. *ib.* Where Evidence of Intent admiſſible deduced from former Acts. *ib.* Levying and conſulting to levy War. § 9. Inviting foreign Invaſion. *ib.* Taking any Step for that Purpoſe. *ib.* Conſtructive levying of War. - - § 9.

II. *Compaſſing or imagining the Death of the Queen Conſort, or of the eldeſt Son and Heir of the King.* - - - § 10.
1. *Who a Queen Conſort.* - - § 10.
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3. *What an Overt Act of compaſſing, &c. their Deaths.* § 10.
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III. *Violating the King's Companion, or eldeſt Daughter unmarried, or the Wife of the King's eldeſt Son and Heir.* - § 11.
1. *Who the King's Companion.* - - § 11.
Queen Conſort during Marriage. - § 11.
2. *Who an eldeſt Daughter unmarried.* - § 11.
Before Marriage; not a widow. - § 11.
3. *Who the Wife of the King's eldeſt Son and Heir.* § 11.
During the Coverture. - - § 11.
4. *What a Violation of either.* - - § 11.

IV. *Levying War againſt the King in his Realm.* - - - § 12.
1. *Direct.*—2. *Conſtructive.* - - § 12.
1. *Direct War, Evidence of.* - - § 12.
Inſurrections to put a Force on the King's Perſon or his Meaſures. § 12. Not an accidental Reſiſtance to his Forces. *ib.* Inception of levying War. *ib.* Warlike Array not neceſſary. § 13. Holding Caſtle againſt the King. § 14. Arming Retainers. *ib.* Joining and continuing with

with Rebels. § 15. Unleſs from Fear, and continued Compulſion. *ib.* Giving or attempting to give Aſſiſtance or Intelligence to Rebels. § 16.

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Attempting by Force to regulate the Meaſures of Government. § 17. To puniſh Public Officers. *ib.* To compel the Making of new, or the Repeal of old Laws. *ib.* To obſtruct the Execution of a public Law. *ib.* But not of a private or local Law. § 17, 18. To redreſs any public or general, but not a private Grievance. *ib.* In all Caſes under this Branch War muſt be levied. § 17. Evidence of co-operation in ſuch Purpoſes. *ib.* Inſurrections of a private or local Nature not within the Law. § 18. How affected by the Riot Act, 1 Geo. 1. ſt. 2. c. 5. § 18.

3. *The War muſt be levied within the Realm.* § 19.

What is ſo. - - - § 19.

V. *Adhering to the King's Enemies.* - § 20.

By Soldiers in particular. - - § 20.

1. *Who an Enemy.* - - - § 20.

Subjects of a Foreign Power in open Hoſtility. § 20. A Queſtion of Fact proved by Notoriety. *ib.* Foreigner acting without Commiſſion from his Sovereign. - - - § 20.

2. *What an Adherence.* - - § 21.

Giving Aid, Comfort, Advice, Intelligence, &c. or doing any Acts towards ſuch purpoſes. § 21. Though the Intelligence do not reach the Enemy. *ib.* And though the Advice be againſt an Invaſion as impracticable. *ib.* So making War on the King's Allies. *ib.* Diſtinguiſhed from Piracy. § 21.

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XII. *Deſertion from the King's Forces.* § 34.
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unleſs the Party arraigned, in open Court, confeſs the ſame. § 63. At Common Law one Witneſs ſufficient. § 64. By the ſaid Statutes two neceſſary in all Treaſons except thoſe relating to the Coin (as well created by Statutes ſubſequent as prior) and Seals, and Sign Manual, and alſo except the particular Treaſons againſt the Life or Perſon of the King included in the ſtat. 40 Geo. 3. c. 93. § 64.

2. *Two Witneſſes are neceſſary before the Grand Jury as well as on the Trial in Court.* - - § 64.

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Judgment.

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For Men. § 70. For Women. *ib.*
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Of High Treaſon, and other incidental Offences immediately againſt the Allegiance due to the King.

§ 1. *Definition.* 1 MS. Sum. 10. 4 Blac. Com. 75. 2 Hale, 86.

HIGH treaſon, which by the very term denotes treachery or breach of faith, is a violation of the allegiance which is due from the ſubject to the king, as ſovereign lord and ſupreme magiſtrate of the ſtate. It is, as Lord Hale ſays, the greateſt crime againſt faith, duty, and human ſociety, and brings with it the moſt fatal dangers to the government, peace, and happineſs of the nation. The life of the king, who is the head of the body politic, and the cement of the ſocial bond, cannot, in the ordinary courſe of things, be taken away by treaſonable practices without involving the whole nation in blood and confuſion; and conſequently every ſtroke levelled at his perſon is levelled at the public tranquillity. This offence, therefore, which includes felony, is the higheſt known to the law, and ſubjects offenders to the greateſt ignominy and puniſhment. It is diſtinguiſhable from ſedition, which is now underſtood in a more general ſenſe, and extends to other offences, not capital, of like tendency, but without any actual deſign againſt the king in contemplation; ſuch as contempts of the king and his government, riotous aſſemblies for political purpoſes, and the like: and therefore a charge of exciting ſedition, or doing any thing ſeditiouſly, does not amount to a charge of high treaſon. But all ſuch contempts, though not amounting

Foſt. 195.

Sum. 11. 3 Inſt. 15. *Diſtinguiſhable from Sedition.* 1 Hale, 77.

1 Hawk. ch. 23.

ing to high treaſon, as not being connected with any actual deſign on foot againſt the ſafety of the king, are yet highly criminal, and puniſhable with fine, impriſonment, and ſometimes with the pillory. Some of theſe offences I ſhall have occaſion to conſider in treating of libels, others will be mentioned incidentally in the courſe of the preſent inquiry. In general, it is ſufficient to obſerve, that all contemptuous, indecent, or malicious obſervations upon his perſon or government, whether by writing or ſpeaking, or by tokens, calculated to leſſen him in the eſteem of his ſubjects, or weaken his government, or to raiſe jealouſies of him amongſt the people, will fall under the notion of ſeditious acts, as well as all direct or indirect acts or threats calculated to overawe his meaſures or diſturb the courſe of his government, not amounting to overt acts of high treaſon, or otherwiſe puniſhable by particular ſtatutes. A ſecond offence of this ſort was, by a late temporary act, 36 Geo. 3. c. 7. ſ. 2., made puniſhable with tranſportation: but that is now ſpent.

Ch. II. § 1. *Definition.*

Vide chapter of Unlawful Aſſemblies, &c.

There are beſides ſome other offences which, though not amounting to high treaſon, yet being direct violations of the duty which the ſubject owes immediately to his ſovereign, have been made capital or ſimple felonies, or ſubjected to the penalties of a præmunire, according to their ſeveral degrees. Theſe I ſhall have occaſion to mention, as they occur in conſideration of the principal ſubject with which they are connected, and which ſeems properly diviſible into the four following heads of inquiry:

1. What is Allegiance.
2. From whom it is required.
3. To whom it is due.
4. What are the Breaches of it which amount to High Treaſon or other leſs Offence.

1. *What is Allegiance.*

§ 2.

Allegiance.
1 Hale, 59. 67.
Foſt. 183.
4 Blac. Com. 74.

Allegiance is that obedience and fidelity which every perſon, under the protection of the laws and government, owes, in return for that protection, to the perſon of the king, as the ſupreme head of the ſtate, and diſpenſer of thoſe laws

Ch. II. § 2. *What is Allegiance.*

and that government. It is the tie which binds every ſubject to be true and faithful to his ſovereign liege lord the king, and truth and faith to bear of life and limb and earthly honour; and not to know or hear of any ill intended him without defending him therefrom. This duty of allegiance alſo binds all perſons to ſerve the king faithfully and diligently in their ſeveral ſtations; to aſſiſt him with their advice when called upon; and to ſerve him in their perſons, if able, in defence of the realm againſt rebels and foreign invaders: and they are indictable as for a high miſdemeanor for the wilful neglect or refuſal of any of theſe their bounden duties. The ſame duty binds every ſubject beyond ſea to return upon the king's letters for that purpoſe, or to reſrain from going abroad, upon the king's pleaſure ſo expreſſed either by the writ of ne exeat regnum, or under the great or privy ſeal or ſignet, or by proclamation; for the contempt of which he is indictable at common law, and his lands may be ſeized till his return. And inaſmuch as the duties and obligations of the king towards his ſubjects ariſe from the moment that he is inveſted with the regal character, and antecedent to his coronation oath, which is only a more ſolemn recognition of thoſe inherent obligations; ſo there is an original, implied, and virtual allegiance which the ſubject owes to the ſovereign antecedent to any expreſs oath or engagement to that effect; for the breach of which, at an age of diſcretion, he is amenable to juſtice.

See the Oath of Allegiance.

1 Hawk. ch. 22. ſ. 2. 4.

2 Hale, 61. 101. Fort. 189.

1 Hawk. ch. 17. ſ. 4.

Allegiance is diſtinguiſhed into *natural* and *local*, which leads to the ſecond head of inquiry.

2. *From whom Allegiance is required.*

§ 3.

From whom allegiance (natural) *is due.*

Foſt. 183, 4. 1 MS. Sum. 10.

Natural allegiance is that which is due from every man who is born a member of the ſociety. His birth in the ſtate entitles him to peculiar privileges, which are, with great propriety, called his birth-right; and this being indefeaſible the allegiance ariſing out of it is equally unalienable: it is due from him at all times and in all places. Hence the maxim nemo poteſt exuere patriam. It is not in the power of any ſubject to ſhake off his allegiance, or transfer it to any foreign prince: nor can any foreign prince, by employing a Britiſh ſubject, diſſolve the bond of allegiance between that ſubject and the crown. Dr. Storie, an Engliſhman, having

Foſt. 60. 1 Hale, 68. 96. 3 Inſt. 11. 1 Hawk. ch. 17. ſ. 7.

having paſſed into Spain, and there ſworn allegiance to that crown, afterwards returned to England in the character of a public miniſter from the Spaniſh King; and entering into treaſonable practices againſt Queen Elizabeth, was condemned and executed for high treaſon. In Townley's caſe his counſel offered to ſhew that at the time of the rebellion, in which he bore a part, he was in the ſervice and pay of the French King; and ſo entitled, as they inſiſted, to the benefit of the cartel for the exchange of priſoners. But the court declared that ſuch proof was inadmiſſible. In truth it was, if poſſible, a great aggravation of his offence. They farther inſiſted on what was improperly called the Capitulation at the ſurrender of Carliſle to the king's forces. In this alſo the court over-ruled them; it being no ſort of defence in a court of law: though to prevent miſconſtruction it was proved that the rebels were expreſsly reſerved to be dealt with according to the king's pleaſure. The ſame doctrine prevailed in the caſe of Æneas Macdonald, who, though a native of Great Britain, had reſided and been educated in France from his early infancy, and acted in the rebellion of 1745, under a commiſſion from the French King. The hardſhip of his caſe was much preſſed; but the court ſaid, that it could not be doubted but that it amounted to high treaſon. Lord C. J. Lee, in directing the jury, told them, that as to the queſtion, Whether or not the priſoner were a native of Great Britain? the preſumption in all ſuch caſes was againſt the priſoner; and that where he put his defence on that iſſue, the proof of his birth out of the king's dominions lay upon him.

Ch. II. § 3. *From whom Allegiance is due.*

Dr. Storie's caſe, 1 Hale, 96. Dy. 298. a. pl. 29. 300. b. pl. 38. Townley's caſe, 1746. Fort. 7.

Æneas M'Donald's caſe before the Special Commiſſioners in Surrey, 1747. Foſt. 59.

The rights of natural born ſubjects are extended by the ſtat. 4 Geo. 2. c. 21. to children born out of the king's allegiance of natural born fathers; and by the ſtat. 13 G. 3. c. 21. to the children of ſuch children.

Allegiance is due as well from the huſband of a queen regnant to her as from a queen conſort to the king.

3 Inſt. 8. 1 Hale, 100. Foſt. 75.

It is a high contempt at common law to refuſe taking the oath of allegiance, which all laymen above the age of 12 years are bound to take at the torn or court leet.

Oaths of Allegiance and Supremacy. 1 Hawk. ch. 24. ſ. 3.

By ſtat. 1 W. & M. c. 8. ſ. 3. Archbiſhops, biſhops, and all perſons of or above the degree of a baron, are required

1 W. & M. ſt. 1. c. 8.

Ch. II. § 3. *From whom Allegiance is due.*

to take the oaths of allegiance and ſupremacy, and make the declaration againſt tranſubſtantiation, at the times and places mentioned. And for omiſſion or refuſal thereof, theſe, and all perſons taking any office, eccleſiaſtical or civil, are ſubjected to the ſame penalties, forfeitures, and diſabilities, as they were before the act, (by ſtat. 1 Eliz. c. 1. and 3 Jac. 1. c. 4. amounting in ſome caſes to præmunire, in others to forfeiture of the office and diſability to hold any); and by ſ. 9. all other perſons, other than thoſe ſpecifically mentioned, refuſing the ſaid oaths of allegiance and ſupremacy, on tender to them by proper magiſtrates, ſhall be committed by ſuch magiſtrates for three months, unleſs they pay ſuch ſum, not exceeding 40s., as ſhall be required by the ſame: and if they refuſe again at the end of three months, they ſhall be impriſoned ſix months, or pay a ſum not above 10l. or under 5l., and alſo find ſureties for their good behaviour and appearance at the next aſſizes; where, if they refuſe the ſaid oath, they ſhall be incapable of any office, and continue bound to their good behaviour until they take the oaths. The oaths are alſo required to be taken by land and ſea officers, on pain of diſability to hold their employments.

30 Car. 2. ſt. 2. c. 1. *Oaths by Members of Parliament.*

By the ſtat. 30 Car. 2. ſt. 2. c. 1. No peer or member of the Houſe of Peers ſhall vote or make his proxy, or ſit there during any debate, and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen, until ſuch peer or member ſhall take the oaths of allegiance and ſupremacy, and make the declaration againſt popery in the manner before deſcribed, under the penalties there mentioned.

Ante, chap. 1. ſ. 19.

Vide ch. 1. ſ. 19.

And by various acts perſons entering upon certain offices or public truſts are required, under high pains and penalties, to take the ſaid oaths.

§ 4. *Local Allegiance; from whom due.*

1 MS. Sum. 10. Foſt. 183, 5. 1 Hale, 59, 60. 62. 92. 3 Inſt. 4. 2 Inſt. 58. 1 Hawk. ch. 17. ſ. 5.

Local allegiance is that which is due from a foreigner during his reſidence here; and is founded in the protection he enjoys for his own perſon, his family, and effects, during the time of that reſidence. This allegiance ceaſes whenever he withdraws with his family and effects; for his temporary protection being then at an end, the duty ariſing from it alſo determines. But if he only go abroad himſelf, leaving his family and effects here under the ſame protection, the duty

duty ſtill continues; and if he commit treaſon, he may be puniſhed as a traitor: and this whether his own ſovereign be at enmity or at peace with ours. Therefore if he aid even his own countrymen in acts or purpoſes of hoſtility, while he is reſident here, he may be dealt with in the ſame manner. The above rule was laid down by all the judges aſſembled, at the queen's command, on the 12th January 1707. It has indeed been obſerved, that the judges, in that reſolution, laid conſiderable ſtreſs on the queen's declaration of war againſt France and Spain, in which ſhe expreſsly took under her protection the perſons and eſtates of the ſubjects of thoſe crowns reſiding here and demeaning themſelves dutifully, and not correſponding with the enemy: for by that declaration, ſay they, thoſe aliens were put upon the foot of aliens coming here by licence or ſafe conduct, and were enabled to acquire chattels, and maintain actions for the recovery and protection of their perſonal rights as fully as aliens amy. Yet I cannot think that this circumſtance eſſentially altered the caſe; for the mere fact of being domiciled here does in itſelf imply an allegiance and an engagement to be true and faithful to the government by which ſuch domicile is protected; and at any rate that the party ſhall not take advantage of this indulgence to prejudice the ſtate more eaſily and effectually. This latter I take to be the true ground upon which an alien enemy, domiciled in this country, may, in ſound reaſon and juſtice, be dealt with as a traitor for aiding or adviſing his own countrymen in acts of hoſtility. The caſe of an ambaſſador reſiding here is not meant to be included in the foregoing obſervations: the exception, if any, is grounded on principles of policy and not of juſtice. But an alien enemy, not domiciled here, taken in avowed hoſtilities againſt the king or his government is no traitor, though leagued with rebels; for he violates no truſt or allegiance.

Ch. II. § 4. *Local Allegiance.*

Delamotte's caſe, O. B. July 1781. S. P.

Foſt. 185.

(Wells v. Williams, Salk. 46. 1 L. Raym. 282.)

See chap. of perſons capable of committing crimes.

Ld. Heriſe's caſe, 3 Inſt. 11. 1 Hale, 59. 94. 7 Co. 6. b. Dalis, 23. 2 Hawk. ch. 17. ſ. 6.

On the trial of ſeveral quakers for their third offence upon the ſtat. 16 Car. 2. an act for ſuppreſſing ſeditious conventicles, one of them pleaded that he was an alien born in France, and ſo not within the penalty of the act, which is levelled againſt every perſon, &c. "*being a ſubject of this realm;*" but this was over-ruled, becauſe as long as he lived here under the king's protection, he is a *ſubject* of the realm, and

Kel. 38.

Ch. II. §4. *Local Allegiance.*

puniſhable for tranſgreſſing its laws: but it was admitted, that if the ſtatute had ſaid, being a *natural born* ſubject, &c. it would not have extended to him.

§5.

3. *To whom Allegiance is due.*

To whom allegiance is due.
Foſt. 188.
2 Hale, 101, 6.
1 Hawk. ch. 17. ſ. 19, 20.
4 Blac. Com. 76.
Vide 1 Mar. ſt. 3. c. 1.
3 Inſt. 7, 8.
Ante, f. 3.

A prince or princeſs ſucceeding to the crown by deſcent or by the previous deſignation of parliament, is, from the moment their title accrues, a king to all intents and purpoſes within the ſtatute of treaſons (25 Ed. 3. ſt. 52. aftermentioned) antecedent to the coronation, which does not confer but pre-ſuppoſes a right. But a titular king, as the huſband of a queen regnant, is clearly not within that law, but does himſelf owe allegiance to the queen.

Foſt. 188. 379. 397, 398.
35 H. 7. c. 1.
1 Hale, 60 101. 304. 272, &c.
Sum. 22.
1 Hawk. c. 17. ſ. 14. &c.

It is alſo agreed that a king de facto, in the full and ſole poſſeſſion of the crown, is a king within the ſame ſtatute of Edward 3.; and that any other perſon out of poſſeſſion is no ſuch king, be his pretenſions what they may. Mr. Juſtice Blackſtone, indeed, ſeems to inſinuate, that "the poſſeſſion of the crown" is a term of too looſe and indiſtinct a ſignification; but Hawkins refers it to the king in whoſe name the laws are adminiſtered, by virtue of which, liberty, life, property, and all other advantages of government are ſecured to the ſubject; which is, in truth, the legitimate and ſolid foundation of allegiance. A poſſeſſion of this ſort does at leaſt imply a general acquieſcence on the part of the nation, and not a mere forcible poſſeſſion of the external ſymbols of royalty, flagrante bello. But when Sir Henry Vane, to an indictment for levying war againſt King Ch. 2., juſtified that all that he had done was by authority of parliament, and that the king was then out of poſſeſſion of the kingdom, and the parliament the only power regnant; it was reſolved, that though King Charles 2d. was in fact kept from the exerciſe of his royal authority by rebels, yet he was king both de facto and de jure, and that all the acts done to keep him out were high treaſon. The latter part of this reſolution furniſhes the true ground of the judgment. Sir H. Vane was actively inſtrumental in preventing the king from aſſuming his authority. But it is a miſapplication of terms to ſay that that prince was king de facto before the period of the reſtoration. Shortly after the ſtat. 13 Car. 2. ſt. 2.

4 Blac. Com. 77.
3 Hawk. ch. 17. ſ. 11.

See 1 Hale, 273. the caſe of the Lady Jane Grey.

Sir H. Vane's caſe, Kel. 14, 15.

R. 2. c. 1. was paſſed, declaring it a præmunire for any perſon to aſſert maliciouſly and adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king. It is indeed happy for thoſe who live in the preſent times, under a known order of regal ſucceſſion, ſettled by the controlling authority of parliament, which has put all theſe queſtions out of countenance. By the ſtat. 1 W. & M. ſt. 2. c. 2. every perſon holding communion with the church of Rome, or profeſſing popery, or marrying a papiſt, is thereby diſabled from inheriting or poſſeſſing the crown of this realm: and in all ſuch caſes the ſubjects are abſolved from their allegiance. And by the act of ſettlement the crown is limited to the heirs of the body of the Princeſs Sophia, Electreſs and Ducheſs Dowager of Hanover, being proteſtants. Theſe acts have been followed by others tending to ſecure this ſucceſſion, which will be noticed in their place.

Ch. II. § 5. *Local Allegiance.*

1 W. & M. ſt. 2. c. 2. ſ. 9. *Papiſts diſabled from poſſeſſing the crown.*

12 & 13 W. 3. c. 2. *Act of ſettlement.*

Poſt. ſ. 32.

I now proceed to conſider

4. *What Acts in Breach of Allegiance amount to High Treaſon or other leſs Offence;* § 6.

which will lead me to the conſideration of the ſeveral acts of parliament declaratory or enactive of high treaſon, or other offences of the ſame nature.

What acts amount to a breach of allegiance.

The firſt and principal of theſe is the ſtat. 25 Ed. 3. ſt. 5. c. 2., emphatically called the Statute of Treaſons, becauſe it reduced and ſettled all treaſons which were before very indefinite, and often ſtretched by arbitrary conſtructions, to certain ſpecific heads therein declared. This ſtatute being the ſtandard of high treaſon, I will begin by ſetting it out at large:—It is thereby declared to be high treaſon,

Statute of Treaſons, 25 Ed. 3. ſt. 5. c. 2. Vide 1 Hale, 82. 87, 9. 262. 4 Blac. Com. 76.

"When a man doth compaſs or imagine the death of our lord the king, or of our lady his queen, or of their eldeſt ſon and heir; or if a man do violate the king's companion, or the king's eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and heir; or if a man do levy war againſt our lord the king in his realm; or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elſewhere; and thereof be proveably (*i. e.* upon ſufficient proof) attainted of open deed by the people of their condition; and if a man counterfeit the king's great or

25 Ed. 3. ſt. 5. c. 2.

(Foſt. 193.)

Ch. II. § 6. *What a Breach of Allegiance.*

privy ſeal, or his money; and if a man bring falſe money into this realm, counterfeit to the money of England, as the money called Luſhburgh, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceit of our lord the king and his people; and if a man ſlay the chancellor, treaſurer, or the king's juſtices of the one bench or the other, juſtices in eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places doing their offices."

The ſtatute afterwards proceeds to give this ſalutary caution, "That becauſe many other like caſes of treaſon may happen in time to come, which a man cannot think nor declare at this preſent time, it is accorded, that if any other caſe ſuppoſed treaſon, which is not above ſpecified, doth happen before any juſtices, the juſtices ſhall tarry without any going to judgment of the treaſon till the cauſe be ſhewed and declared before the king and his parliament, whether it ought to be judged treaſon or other felony."

1 Hale, 308. 1 Hawk. ch. 17. ſ. 2. 4 Blac. Com. 86. 87. 2 Mar ſt. 1. c. 1. 1 Ed. 6. c. 12. ſ. 2.

This ſtatute was re-enforced and again made the only ſtandard of treaſon by the ſtat. 1 Mar. ſt. 1. c. 1., which abrogated all intermediate acts creating new treaſons or miſpriſions of treaſon: ſince which time, however, other treaſons have been added by various ſtatutes; of theſe it is only neceſſary to ſet forth the laſt in this place, reſerving the reſt for incidental mention, as the ſubject matters of them occur.

36 Geo. 3. c. 7.

By ſtat. 36 Geo. 3. c. 7. "If any perſon, after the paſſing of this act, during the natural life of the king, and until the end of the next ſeſſion of parliament after a demiſe of the crown, ſhall, within the realm or without, compaſs, imagine, invent, deviſe, or intend death or deſtruction, or any bodily harm tending to death or deſtruction, maim or wounding, impriſonment or reſtraint, of the perſon of the king, his heirs or ſucceſſors, or to deprive or depoſe him or them from the ſtyle, honour, or kingly name of the imperial crown of this realm, or of any other of his majeſty's dominions or countries; or to levy war againſt his majeſty, his heirs or ſucceſſors within this realm, in order by force or conſtraint to compel him or them to change his or their meaſures or counſels, or in order to put any force or conſtraint upon, or to intimidate or overawe, both or either houſes of parliament;

parliament; or to move or ſtir any foreigner or ſtranger with force to invade this realm, or any other his majeſty's dominions, or countries, under the obeiſance of his majeſty, his heirs and ſucceſſors; and ſuch compaſſings, imaginations, inventions, devices, or intentions, or any of them, ſhall expreſs, utter, or declare, by publiſhing any printing or writing, or by any overt act or deed; being legally convicted thereof, upon the oaths of two lawful and credible witneſſes, upon trial, or otherwiſe convicted or attainted by due courſe of law, then every ſuch offender ſhall be deemed, declared, and adjudged to be a traitor." By ſ. 5. the benefit of the acts of the 7 W. 3. c. 3. and 7 Ann. c. 11. as to the trial is reſerved.

Ch. II. § 6. *What a Breach of Allegiance.*

By the act of union with Scotland, high treaſon or miſpriſion of treaſon in England, and none elſe, ſhall be high treaſon or miſpriſion of treaſon in Scotland. Such a proviſion was not neceſſary in the caſe of Ireland, which had the ſame general laws as Great Britain before its union with it; and therefore the 8th article of the union with Ireland only provides that all the laws in force, at the time of the union, in either country reſpectively ſhall remain, unleſs afterwards altered.

Scotland. 7 Ann. c. 21.

Ireland. 40 Geo. 3.

Keeping the leading ſtatute of the 25 Ed. 3. principally in view, that and the reſt furniſh altogether the following diſtinct heads of offence:

Diviſion of the Subject.

1. *The Compaſſing or imagining the Death of the King.*
2. *Compaſſing or imagining the Death of the Queen, or the eldeſt Son and Heir of the King and Queen.*
3. *Violating the King's Wife, or eldeſt Daughter unmarried, or the Wife of his eldeſt Son and Heir.*
4. *Levying War againſt the King in his Realm.*
5. *Adhering to the King's Enemies.*

   [*And herein of the inferior Offence of enliſting into foreign Service, done without any treaſonable Deſign.*]
6. *Counterfeiting the King's Seals.*
7. *Killing his Officers,*
8. *Concerning the Coin.*
9. *Concerning Papiſts and the King's Supremacy.*
10. *Concerning the Succeſſion to the Crown.*

Ch. II. § 7. *Compaſſing or imagining the King's Death.*

11. *Seducing or attempting to ſeduce others from their Allegiance.*

[*To theſe I ſhall add, as an Offence of an analogous Nature*]

12. *Deſertion from the King's Forces.*

I. The firſt kind of high treaſon declared by the ſt. 25 Ed. 3. is

§ 7. "*Where a Man doth compaſs or imagine the Death of our Lord the King.*"

1 MS Sum. 13. Foſt. 193, 4, 5. Kel. 8. 1 Hale, 107, 8. 1 Hawk. ch. 17. ſ. 8. 4 Blac. Com. 79.

In this ſpecies of treaſon the old rule, which prevailed in all caſes of homicide, quod voluntas reputabatur pro facto, applies in its full extent. A mere imagination of the heart, if any open or overt act be done towards effectuating the deſign, (without which it cannot poſſibly fall under any judicial cognizance,) is deemed the ſame degree of guilt as if carried into actual execution. But ſtill *the compaſſing and imagining the death* is the ſubſtantive treaſon; and the indictment muſt charge in the ſtrict words of the ſtatute, that the defendant did traiterouſly

1 MS. Sum. 11. *compaſs and imagine, &c.*, and then charge the ſeveral overt acts as the means and evidence by which the traiterous intention was manifeſted.

Evidence of the Compaſſing, &c. Actual killing. Kel. 8. Foſt. 194. 1 Hawk. ch. 17. ſ. 8.

It remains then to be ſhewn what are ſufficient overt acts or legal evidence of ſuch an intention. The firſt ſet of acts is where the king's life is immediately aimed at. In the caſe of the regicides the beheading of King Charles I. was laid as an overt act of compaſſing his death; and the perſon ſuppoſed to have given the ſtroke was convicted on

1 Hale, 41. 107. 1 Hawk. ch. 17. ſ. 10. the ſame indictment. Though if a man ſhould, by mere miſchance or without any evil deſign, involuntarily hurt or even kill the king, it would not be treaſon: as when Walter Tyrrel, aiming at a deer, killed William Ruſus by the glancing of the arrow from a tree.

Preparing means of death. 1 MS. Sum. 13. 1 Hale, 109. 119. 4 Blac. Com 79. Charnock's caſe, 1 St. Tr. 130. 4 St. Tr. 562.

So the providing weapons, ammunition, or any other means of accompliſhing or procuring his death, in order to effectuate that intent, or the ſending letters, or aſſembling for that purpoſe, is evidence of high treaſon under this branch of the ſtatute.

Salk. 631.

Conſultation. 1 MS. Sum. 13. P. 8. 195.

A bare conſulting with others how to kill the king, though nothing elſe be done, and though the conſpirators

do

Ch. II. §7. *Compaſſing, &c. the King's Death. Conſultation.*

do not then determine upon any ſcheme for that purpoſe, or do not agree in their reſolution, is an overt act of the ſame treaſon. If a perſon be preſent at only one ſuch conſultation and conceal it, having had a previous knowledge of the deſign of the meeting, it is evidence to be left to a jury of his aſſent to the deſign, though he neither did nor ſaid any thing at ſuch conſultation; but if he had no ſuch previous knowledge, as if he fell into the company by accident or upon ſome indifferent occaſion, a bare concealment without an expreſs aſſent is only miſpriſion of treaſon. But if he be preſent at more than one ſuch conſultation, and do not diſſent or make a diſcovery, it is ſtrong evidence of aſſent. And an aſſent to any overtures for that purpoſe is a plain overt act of compaſſing the king's death, in like manner as any advice, perſuaſion, or command, to incite, encourage, or procure others to make an attempt againſt his perſon.

Walcot's caſe, Show. P.C. 128. 4 Mod. 395. MS. Tracy, 14. Kel. 16. 17. 21. 4 Blac. Com. 79. 120. Rookwood's caſe, 4 St. Tr. 680. Somerville's caſe, 1 And. 106. 1 Hawk. ch. 20. ſ. 2, 3. Vide poſt. Miſpr. of Treaſon. Sir E. Digby's caſe, per Holt, C. J. in Rookwood's caſe, 4 St. Tr. 690, 2. MS. Tracy, 22. Kel. 12.

§ 8. *Depoſing or taking poſſeſſion of the king or government.*

The next head of overt acts of the ſame ſpecies of treaſon relates to depoſing or taking poſſeſſion of the king's perſon, which the common experience of all times and nations has ſhewn to be the moſt probable prelude to his death. And therefore it is laid down by our writers that the conſtruction of this ſpecies of treaſon extends to every wilful and deliberate act or attempt whereby the king's perſon may probably be endangered, or ſuch as cannot be executed without the apparent peril thereof. Accordingly, entering into meaſures for depoſing or impriſoning him, or for forcibly taking his perſon into the power of the conſpirators, or to compel him by force to yield to certain demands, or to remove evil counſellors, and all ſuch other like notorious acts done or conſpired to be done againſt his perſon or regal government, may be alleged as overt acts of compaſſing his death: they have a manifeſt tendency to that fatal iſſue.

1 MS. Sum. 13. Foſt 195. 1 Hawk. ch. 17. ſ. 9. 30. 3 Inſt. 12. 4 Blac Com. 79. 1 Hale, 109, 110, 111. 121, 122. Lord Eſſex's caſe, Kel. 20, 21. Sum. 11. Parkins' caſe, 4 St. Tr. 651. Caſe of the Rebel Lords in 1715, 6 St. Tr. 1. &c. Harding's caſe, 2 Ventr. 315.

The Earl of Eſſex intending to go to the court, where the queen was, and take her into his power, and to remove ſome of her council, and having for that end aſſembled a multitude of people, it was deemed an overt act of compaſſing the queen's death; although, as the caſe is reported in Moor, he did not intend any corporal hurt to her. And this being rebellion in Eſſex, the adherence of the Earl of Southampton to him in that act was alſo adjudged treaſon; though the latter

Caſe of the Lords Eſſex and Southampton, Hil. 43 Eliz. 3 Inſt. 12. 1 Hale, 120. 138. Kel. 76. Moor, 621.

Ch. II. § 8. *Compaſſing, &c. the King's Death.*

latter did not know of any other purpoſe than a private quarrel which Eſſex had with ſome of the queen's ſervants. So it is ſaid that thoſe alſo were traitors who went with Eſſex to London, whether or not they knew of his intent, and though they departed upon the proclamation.

Overawing and ſubverting parliament. Caſes of Hardy, Horne Tooke, and others, O. B. 1794, MS.

The indictment in the caſes of Hardy, Horne Tooke, and others, charged as overt acts of compaſſing the king's death; that the ſeveral priſoners, together with others, conſpired to procure a convention to be aſſembled, with intent that the perſons aſſembled thereat ſhould, without the authority of parliament, ſubvert and alter the legiſlature and government of the country, and depoſe the king. That the conſpirators wrote and publiſhed pamphlets, letters, reſolutions, and addreſſes, containing incitements to induce the king's ſubjects to ſend delegates to conſtitute ſuch convention. That they met and conſulted concerning the aſſembling of ſuch convention, and the means by which the king's ſubjects might be induced to ſend delegates to conſtitute the ſame. That they cauſed arms and other weapons to be provided for the purpoſe of arming the king's ſubjects, to the intent that they might oppoſe the king in the due exerciſe of his lawful power and authority in the execution of the laws, and might ſubvert and alter, without, and in defiance of the authority, and againſt the will of the parliament, the legiſlature and government, and depoſe and aſſiſt in depoſing the king. The Lord C. J. Eyre, in ſumming up to the jury on Tooke's trial, ſaid, that it could not be denied that he who meant to depoſe the king compaſſed and imagined his death. It was a preſumption of fact, ariſing from finding an intention to depoſe, ſo undeniable, that the law had adopted it and made it a preſumption of law. It had been ſo ſettled for centuries. That if the priſoner had been concerned in a plan to eſtabliſh a convention to uſurp the powers of government and depoſe the king, it did not ſignify to what extent the powers of government were to be uſurped. All the danger to the perſon of the king would follow, he being bound to ſupport the government and reſiſt the uſurpation at all hazards. That there was a great diſtinction between a reſiſtance to the execution of the laws and an aſſumption of the powers of government. The material conſider-

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ation,

ation, therefore, for the jury was, for what purpoſe the convention was to be holden, in the deſign of calling which the priſoner had participated; and that was a matter of fact. That the avowed intention of it being to obtain a reform in the repreſentation of the commons' houſe of parliament, it lay upon the proſecutor to prove that that was not ſo; and the proſecutor had undertaken to prove that that was a mere pretext, and that the real object and tendency of it was that charged in the indictment, which was for the jury to determine. Ch. II. § 8. *Compaſſing, &c. the King's Death.*

Several publications having been given in evidence on the trial, on the part of the crown, containing republican doctrines and opinions, which had been patroniſed, and the diſtribution of them promoted, by the priſoners, during the period aſſigned in the indictment for the exiſtence of the conſpiracy; and ſuch evidence having been relied on, to ſhew that the notion of a reform in parliament, which the priſoners were expected to ſet up in their defence, was a mere pretext to cover a revolution of the government and a depoſition of the king: to rebut ſuch concluſions on the part of the priſoner, Mr. Tooke, a book written by him, intitled a letter to Mr. Dunning (the late Lord Aſhburton,) on the ſubject of parliamentary reform, and expreſſive of his veneration for the king and conſtitution, was offered in evidence. To this the Attorney-general objected; contending that what the priſoner had written, ſaid, or publiſhed, at any time antecedent to the period of the conſpiracy with which he was charged, was not evidence. That the book had no relation to the particular tranſaction: and as well might any writer on the crown law give in evidence that he had written againſt robbery, if he were indicted for that crime: and that whatever the priſoner's opinions were then, he might have afterwards altered them. The counſel for the priſoner inſiſted on its being evidence to ſhew the mind of the priſoner, and that he could not have in view what was imputed to him by the indictment. That, as a book written by him in favour of a republic would be evidence againſt him, this muſt è converſo be evidence for him. That in caſe of murder it was competent to prove the defendant a man of humanity, and in crimes of another ſort to prove him a man of a chaſte and virtuous life. That in Lord Ruſſell's caſe, Dr. Tillotſon gave evidence of his moral and religious habits. S. C.

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habits. *Lord C. J. Eyre* ſaid, he doubted if the book could be received in evidence on the ground of general character; that it was a particular act; and it was not competent in giving evidence of character to prove particular inſtances, but only the general reſult of them; ſuch as had been given in evidence in Hardy's caſe, of loyalty and attachment to the king. That the queſtion was not whether this book had a reference to the conſpiracy charged, but whether it had not reference to the proof given in ſupport of the charge; and he thought it evidence to rebut the idea that the reform of parliament was a pretence made by the priſoner, and that his real object was to overturn the government. The book was accordingly received in evidence by the court. It was printed in 1782; and refuted the idea that every man was entitled to an equal ſhare in the government of the country; and was in commendation of the regal and ariſtocratic parts of the conſtitution.

36 Geo. 3. c. 7. *Compaſſing to levy war.*

By the ſtat. 36 G. 3. c. 7. before mentioned, the compaſſing to levy war againſt the king, in order to put any force or conſtraint upon, or to intimidate or overawe both or either houſe of parliament, is made a ſubſtantive treaſon during the king's life.

Ante, p. 56.

§ 9. *Levying and conſulting to levy war.*

1 MS. Sum. 13. Foſt. 196, 197. 211. 3 Inſt. 14. 2 Hawk. ch. 17. ſ. 31. MS. Burnet. 1 Hale, 120, 1, 2. 131. 144, 5. 148. Dr. Storie's caſe, Dy. 298. b. Harding's caſe, 2 Ventr. 315. Friend's caſe, 4 St. Tr. 599. Layer's caſe, 6 St. Tr. 328. Kel. 20, 1. Sum. 13.

An offence, though it fall under one branch of the ſtat. of Ed. 3. as a ſpecific treaſon, may alſo come within the conſtruction and be deemed an overt act of another; though Lord Coke thought otherwiſe. Thus the levying war againſt the king may be laid as an overt act of compaſſing his death; and ſo is a treaſonable correſpondence with the enemy; or raiſing troops for his ſervice; though ſuch acts more naturally fall within the clauſe of adhering to the king's enemies. But further, the bare conſulting or conſpiring to levy war, though not within the latter branch at all, is an overt act of compaſſing the king's death; for ſuch acts have a tendency, though not ſo immediate, to the ſame end. Lord Hale indeed in his ſummary, ſpeaking of this head of treaſon, ſays, "conſpiring to levy war is no overt act, unleſs levied, becauſe it relates to a diſtinct treaſon." This doctrine is true, if confined to a conſtructive levying of war, ſuch as to pull down incloſures, to lower the markets, or the like; but the reaſon aſſigned is a bad one; for the levying war againſt the king is not in all caſes a diſtinct treaſon. If a war be levied againſt his perſon, it will equally fall within

1 MS. Sum. 13. Foſt. 197. 211. 213. Foſt.

this

this branch of treaſon as an overt act of compaſſing his death. And Lord Hale himſelf appears to have altered his opinion. The ſame diſtinction appears to have been taken by Lord Holt in Sir John Friend's caſe, which he ſaid had been holden to be law at all times; that, if the deſign be to kill, depoſe, or impriſon the king, and as the means to effect this the conſpirators agree to levy war, this is treaſon, though no war be levied; for the conſultation for any ſuch purpoſe is an overt act proving the compaſſing the king's death. But, under the act of the 36 Geo. 3., the mere compaſſing to levy war, in order to conſtrain the king, is a ſubſtantive treaſon. So the entering into meaſures, in concert with foreigners and others, for invading the kingdom, a treaſon of ſignal enormity; or going into a foreign country, or even purpoſing to go there to that end, and taking any ſteps in order thereto, will fall under the ſame conſtruction. And, indeed, unleſs the powers ſo incited happen then to be actually at war with us, the offence will not fall within any other branch of the ſtatute of treaſons than that of compaſſing the king's death; though this is alſo provided for by the ſtat. 36 Geo. 3. during the king's life. For by that act the compaſſing, &c. "to move or ſtir any foreigner or ſtranger with force to invade this realm, or any other his majeſty's dominions or countries under his obeiſance, is made a ſubſtantive treaſon." Lord Preſton, with ſome others, were indicted upon this branch of the ſtatute of Ed. 3., as well as on that of adhering to the king's enemies; and the compoſing, procuring, and ſecreting treaſonable papers; and taking boat, in order to go on board the veſſel which was to carry them to France; and carrying the papers with them, in order to be uſed there for the treaſonable purpoſes charged in the indictment, were proved as overt acts of both ſpecies of treaſon. The like courſe was taken in Stone's caſe upon a trial at bar.

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1 Hale, 119. 122, 3. MS. Tracy, 14. Friend's caſe, 4 St. Tr. 625, 6.

Ante, p. 56.

Dr. Storie's caſe, ante, p. 51. Parkyn's caſe, 4 St. Tr. 651. Lord Preſton's caſe, infra. Foſt. 197. poſt. ſ. 20.

Ante, p. 56.

Lord Preſton's caſe, 4 St. Tr. 409, &c. 448.

Stone's caſe, poſt.

Lord Hale, ſpeaking of a conſtructive levying of war, ſays, that ſuch may in proceſs of time riſe into a direct war againſt the king; as if the king ſend his forces to ſuppreſs them, and they fight the king's forces; and then it may be an overt act to prove the compaſſing of the king's death.

By conſtructive levying of War. 1 Hale, 123. poſt. ſ. 27.

I do not know that this point, that a mere conſtructive levying of war is evidence of compaſſing the king's death, has ever come directly in judgment. It was not ſo conſi-

dered

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dered by any of the judges in Cotton's caſe; and the point could not ariſe on the trials of Damaree and Purchaſe, who were ſeverally convicted upon a conſtructive charge of levying war only; there being no count for compaſſing the queen's death. It muſt, however, be admitted, that the object of a great riot or inſurrection, comparatively trivial in its origin, may ſo far vary by its ſucceſs, continuance, or other circumſtances, as to aſſume a decided tone of reſiſtance to the perſon of the king and his government, and ſo become an overt act of compaſſing his death. For it is a kind of natural or neceſſary conſequence, Lord Hale obſerves, that he who attempts to ſubdue the king cannot intend leſs than his death; and ſuch, he adds, has always been the miſerable conſequence of ſuch a conqueſt.

Cotton's caſe, Kel. 73.
Caſe of Damaree and Purchaſe, 8 St. Tr 218. 268. 247. 285. 290.
Foſt. 213.
1 Hale, 148.

§ 10. II. It is further declared to be high treaſon by ſtat. 25 Ed. 3.

"*When a Man doth compaſs or imagine the Death of our Lady, his (the King's) Queen, or of their eldeſt Son and Heir.*"

Compaſſing the Death of the Queen or eldeſt Son and Heir.

"The queen" means the queen conſort or wife of the king, and extends to a wife de facto during the coverture, and until a divorce. But after a divorce, though it be only a menſâ et thoro, ſhe is not within the ſtatute; although Lord Hale does not extend the excluſion further than a divorce a vinculo matrimonii. But certainly a queen dowager, namely, a queen after the death of her huſband, is not within the act.

25 Ed. 3. ſt. 5. c. 2.
1 Hale, 124.
3 Inſt. 8.
1 MS. Sum. 9. 12.

"Their eldeſt ſon and heir" extends to a ſecond born ſon, after the death of the elder, and the like of the reſt; and notwithſtanding the king ſhould have married a ſecond wife, and ſo the ſon ſhould not be *their* eldeſt ſon, but only the king's ſon. In like manner the eldeſt ſon of a queen regnant is within the act. Lord Hale alſo inclines to think that the deſcription may extend to a grandſon (being heir apparent after the death of his father), though he concludes that it is moſt fit to be firſt decided by parliament, according to the caution given in the ſtatute of the 25 Ed. 3. But a collateral heir apparent is certainly not within the act; nor an eldeſt daughter and heir apparent; becauſe a ſon may be born after; and temporary proviſions have been made by the legiſlature in ſuch caſes.

1 Hale, 125, 6. 9.
3 Inſt. 8, 9.
Sum. 12.

Ante, p. 56.

Ch. II. § 10. *Compaſſing, &c. the Queen's or Prince's Death.*

As to what ſhall be ſaid to be an overt act of compaſſing their death; it muſt be ſuch as ſhews an unlawful intent againſt their *perſons*, and not merely againſt their *ſtate and dignity*. Therefore much of what has been already ſaid concerning overt acts of compaſſing the death of the king, which are ſpecifically appropriate to him and his ſovereign power and royal dignity, does not apply to the queen or prince. Thus a compaſſing to impriſon or otherwiſe puniſh them by due courſe of law is not within the ſtatute; but a compaſſing to wound them is.

What a Compaſſing. Burnet's MS. Sum. 12.

1 Hale, 127, 8.

§ 11.

III. The next treaſon declared by the ſtat. 25 Ed. 3. is,

"*If a Man do violate the King's Companion, or the King's eldeſt Daughter unmarried, or the Wife of the King's eldeſt Son and Heir.*"

Violating King's Wife, Daughter, &c. 25 Ed. 3. ſt. 5. c. 2. 4 Blac. Com. 81. 1 Hale, 124. 127, 8. 3 Inſt. 8. 1 Hawk. ch. 17. ſ. 22.

By the king's companion is meant his wife, that is, the queen conſort, during the marriage. And as the reaſon of the law was to guard the ſucceſſion of the crown from any ſuſpicion of baſtardy, when the reaſon ceaſes, the law ceaſes with it. Therefore to violate a queen dowager or princeſs dowager is no treaſon. On the ſame principle the law extends to a ſecond daughter, the eldeſt being dead during the father's life; and this whether there be any ſons or not. It ſeems, however, to be underſtood, that by the words of the ſtatute, "*nient marry*" (unmarried), is meant *before marriage*, and therefore not applicable to the eldeſt daughter afterwards, though a widow. And yet, for the reaſon before ſuggeſted, the law might with more propriety have been applied to the eldeſt daughter under coverture, when by law her iſſue might lay claim to the crown. Again, "the wife of the king's eldeſt ſon and heir" means the princeſs conſort during the coverture. And the eldeſt ſon and daughter of a queen regnant are equally within the meaning of the ſtatute. In either caſe mentioned by the ſtatute, by "violation" is intended carnal knowledge, as well without force as with it; and this is high treaſon in both parties, if both be conſenting.

4 Blac Com 81. 1 Hale, 128. 3 Inſt. 9.

Ch. II. § 12. *Levying War.*

§ 12.

IV. The fourth treaſon declared by the ſtat. 25 Ed. 3. is, "*If a Man do levy War againſt our Lord the King in his Realm.*"

25 Ed. 3. ſt. 5. c. 2. 1 Hale, 130. 148, 9. ante, ſ. 9. Kel. 20. poſt. ſ. 19.

Under this branch there muſt be an actual levying of war, and not barely a conſultation ſo to do; but the latter is made a diſtinct treaſon by the ſtat. 36 Geo. 3. c. 7. during the king's life. Such war muſt alſo be levied againſt the king; and it muſt be in his realm.

1 Hale, 152.

The levying war is either expreſs and direct, or conſtructive.

Evidence of the fact. 1 MS. Sum. 13, 14. 1 Hale, 122. 131. 146. 149. 152. Foſt. 210, 211. 1 Hawk. ch. 17. ſ. 23. 4 Blac. Com. 81. Ld. Eſſex's caſe, ante, ſ. 8.

1. Of the firſt ſort are all inſurrections againſt the perſon of the king, whether they be to dethrone, impriſon, or force him to alter his meaſures of government, or to remove evil counſellors from about him. In Eſſex's caſe, though the indictment was upon the clauſe of compaſſing the queen's death, yet, ſays Lord Hale, his riding armed into London, and ſoliciting the citizens to go with him to court to remove the queen's miniſters, and his fortifying his houſe againſt the queen's officers, were in truth overt acts of levying war.

Foſt. 219. 1 Hale, 146.

So the attacking the king's forces, in oppoſition to his authority, upon a march or in quarters, is levying war againſt the king. But if, upon a ſudden quarrel, from ſome affront given or taken, and not as a cover for any traiterous deſign, the neighbourhood ſhould riſe and drive the king's forces out of their quarters; though it would be a great miſdemeanor, and, if death enſued, might be felony in the aſſailants; yet it will not be a treaſon; there being no intention againſt the king's perſon or government. Thus it often happened formerly between the lords marchers, that upon private quarrels they collected their dependants in battle array, and levied war upon each other; but theſe acts were never holden to be treaſon, though doubtleſs deſerving of the moſt condign puniſhment. The intention in theſe caſes is of the eſſence of the offence. So the carrying off or deſtroying the king's ſtores, provided for the defence of the kingdom, if done in conjunction with or in aid of rebels or enemies, will amount to treaſon within this and the next branch; but otherwiſe, if done only for lucre, or ſome private malicious motive; and this being uſually the caſe, I ſhall refer the conſideration of ſuch offences to the more appropriate heads of larceny and malicious miſchief.

1 Hale, 131. 135. 140. 260.

What an inception of levying war.

It muſt in general be difficult in the inception of inteſtine troubles to fix the period when oppoſition to the eſtabliſhed government

government ſhall be ſaid to wear the formidable appearance of inſurrection, and to conſtitute what in the terms of the act is called a levying of war againſt the king. Ch. II. § 12. *Levying War.*

It is ſtrictly, therefore, a queſtion of fact to be tried by the jury under all the circumſtances. Any aſſembly of perſons, met for a treaſonable purpoſe, armed and arrayed in a warlike manner, is bellum levatum, though not percuſſum. Enliſting and marching are ſufficient overt acts, without coming to an actual engagement; in the ſame manner as cruiſing under an enemy's commiſſion, though no act of expreſs hoſtility be proved, is an adherence to the king's enemies. 1 Hale, 130, 1. 149. 1 MS. Sum. 13. Foſt. 218. 1 Hale, 131. 144. 152. Vaughan's caſe, 5 St. Tr. 37. Salk. 635. poſt. p. 80.

But though, in the caſe of levying war, the indictment generally charges, that the defendants were armed and arrayed in a warlike manner, and, where the caſe admits of it, with ſwords, guns, drums, colours, &c.; yet Mr. Juſtice Foſter obſerves, that in none of the caſes, not even in Benſtead's, did the queſtion turn ſingly on any of theſe circumſtances; but the true criterion has been, Quo animo did the parties aſſemble? Whether for a private and particular or for a public and general purpoſe? And he obſerves, that in the caſes of Damaree and Purchaſe, which turned on a conſtructive levying of war, no evidence was given of the uſual pageantry of war, nor of any regular conſultation previous to the riſing; and yet the objection weighed nothing with the court. Numbers will often ſupply the want of military weapons and diſcipline, as experience has often evinced; and ſuch was the opinion of five of the judges in the weavers' caſe in 1675. Lord Hale ſtates it as a queſtion worthy of conſideration; and goes no further than to obſerve, that the actual aſſembling of many rioters in great numbers, to do unlawful acts, if it be not modo guerrino or in ſpecie belli, as if they have no military arms, nor march or continue together in the poſture of war, though they make a great riot, yet does not *always* amount to a levying of war. It depends, as he ſtates before, upon many circumſtances difficult to enumerate or define, and is in truth a queſtion of fact; and how difficult a fact it is to define in terms, may be collected from an expreſſion made uſe of by the ſame author in another place, where he ſays, that the actual marching in a body modo guerrino *et modo inſurrectionis*, might be a levying of war. It ſeems to me, however, that Lord Hale did not mean to puſh the obſervations above mentioned § 13. *Warlike Array.* Foſt. 208. Poſt. p. 73. Poſt. p. 741 1 Hale, 131. 144. 1 Hale, 144. 1 Hale, 149—152.

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mentioned further than concerned caſes of conſtructive levying of war, as one among other clues to diſtinguiſh between an inſurrection and a great riot. Becauſe, ſays he, when an aſſembly of perſons thus arm themſelves, (namely, in a military poſture,) it is a plain evidence that they mean to defend themſelves, and make good their attempts by a military force, and to reſiſt and ſubdue all power that ſhall be uſed to ſuppreſs them. In this view of the ſubject, any appearance of martialing or making military preparation ſeems to be a very ſtrong feature in the merits of the caſe. But every inſurrection, which in judgment of law is intended againſt the perſon of the king, as for the purpoſes firſt mentioned, amount to a levying of war within the ſtatute, whether or not attended with the pomp and circumſtances of open war; for they cannot be effected by numbers and open force without manifeſt danger to his perſon.

Vide 1 Hale, 153. Foſt. 210, 211. 1 Hale, 151. ante, p. 67.

§ 14. *Holding a Fort, &c. againſt the King.* Foſt. 219. 1 Hale, 146. 168. 296. 325, 6.

Holding a caſtle or fort againſt the king or his troops, if actual force be uſed in order to keep poſſeſſion, is levying war; but a bare detainer, as ſuppoſe by ſhutting the gates againſt the king or his troops, without any other force from within, Lord Hale *conceiveth*, (ſays Mr. Juſtice Foſter,) will not amount to treaſon. The laſt-mentioned judge has not told us what degree of approbation he gives to this inſtance of a detainer, which, as he ſays, Lord Hale *conceives* not to be within the ſtatute.

It may be fairly queſtioned, Whether there be not many inſtances of conſtructive levying of war far ſhort of the real guilt and conſequences of ſuch an act, and much leſs within the true meaning of the ſtat. 25 Ed. 3.? Lord Hale prefaces the paſſage in queſtion thus; "If *B.* either fortify his own houſe, or the houſe of another, with weapons defenſive or invaſive, purpoſely to make head againſt the king, and to ſecure himſelf againſt the king's regal army or forces, then that is a levying of war againſt the king." He then proceeds: "But the bare detaining of the king's caſtles or ſhips ſeems no levying of war within this ſtatute." And his lordſhip refers to a ſubſequent part of his work, where he grounds his reaſoning ſolely on the ſtat. 14 Eliz. c. 1. (*a*), having enacted the ſame thing during the queen's life. This, if it ſtood alone, would not be a concluſive argument, as might be proved by many paſſages, as well as by the expreſs declaration of the ſame author. Beſides which, that ſtatute was

1 Hale, 146.

1 Hale, 321. (by miſtake called 13) Eliz. c. 1.

(*a*) *Lord Hale* (*p.* 296.) *makes the ſame obſervation on the ſtat.* 5 & 6 *Ed.* 6. c. 11.

Vide 1 Hale, 261. Foſt. 224. Poſt. ſ. 56.

was certainly creative of new treaſon; for it makes the wilful and malicious burning of the queen's ſhips treaſon, without any further qualification. But, moſt of all, I find it difficult to reconcile this opinion with the preceding part of the paſſage which I have referred to; for, ſuppoſing a treaſonable intent to exiſt, What ſolid diſtinction can there be between a man's fortifying his own or another's houſe, purpoſely to make head againſt the king, and to ſecure himſelf againſt the regal forces, (which is admitted to be an overt act of levying war,) and the caſe of one who detains the poſſeſſion of the king's own fortreſs againſt himſelf, with the ſame intent? for the manner of putting the firſt caſe ſuppoſes that no reſiſtance has been actually made. On the contrary, is not the latter caſe, put by Lord Hale, as much at leaſt within the reaſon and contemplation of the ſtat. 25 Ed. 3. as the former one? Is not the act of fortifying a private houſe, which may happen from caprice, of a more equivocal nature in itſelf than that of a governor of a fortreſs refuſing to deliver it up to the king upon his ſummons, and ſhutting the gates againſt him. Admitting that this latter is not concluſive evidence of a traiterous intent any more than the other; yet ſurely it ſeems ſufficient to leave to a jury. It is *holding a caſtle againſt the king*, which is as much an act of hoſtility, and a throwing off of the allegiance due to him, as any of the ordinary preparations of war are admitted to fall within the deſcription of levying war, though no act of force has been in fact exerted. In the caſe of the Earl of Eſſex, it is even ſaid, that keeping armed men againſt the king's command is a levying of war againſt him (*a*), which is a far leſs deciſive act of oppoſition than the other. And Lord Hale himſelf, ſpeaking in another place of the ſtat. 26 H. 8. c. 13. ſays, that that part of it whereby the rebellious detaining of the king's caſtles, after ſummons by proclamation, is made high treaſon, ſeems to be treaſon within the ſtat. 25 Ed. 3.; and both Lord Hale and Foſter, J. agree, that if the bare detainer be done in confederacy with enemies or rebels, that circumſtance will make it treaſon; in the one caſe under the clauſe of adhering to the king's enemies, in the other under that of levying war. The ſame rule applies to the delivery up of a caſtle to rebels or enemies, by trea-

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Vide 1 Hale, 275.

1 Hawk. ch. 17. ſ. 24. 3 Inſt. 10.

Ante, ſ. 12.

Ld. Eſſex's caſe, Moor, 621.

1 Hale, 275.

Supra, *at the beginning of this ſection.*

(*a*) But this muſt be underſtood, that the purpoſe for which they were armed was treaſonable.

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chery and in combination with them; but not if it happened through cowardice or imprudence.

§ 15. *Joining and continuing with rebels.* Foſt. 216. *ante*, f. 8. Moor, 621. Kel. 76. Poſt. f. 17. 8 St. Tr. 247. 290. 1 Hawk. ch. 17. f. 26. Rex v. Green and Bedell, O. B. 20 Car. 2. Kel. 70. 79. *Vide* 2 Ld. Ray. 1585.

Joining with rebels, freely and voluntarily, in any act of rebellion, is levying war againſt the king; and this too though the party was not privy to their intent. This was holden in the caſe of the Earl of Southampton, and again in Purchaſe's caſe in 1710. But yet it ſeems neceſſary in this caſe, either that the party joining with rebels and ignorant of their intent at the time, ſhould do ſome deliberate act towards the execution of their deſign, or elſe ſhould be found to have aided and aſſiſted thoſe who did. Therefore, in the caſes of Green and Bedell, who with others were indicted for levying war and pulling down bawdy houſes and opening priſons, it being only found that they were preſent, and not finding any particular act of force committed by them, or that they were aiding or aſſiſting to the reſt, which is a fact that muſt be found by the jury, and cannot be implied, they were diſcharged. And if the act of thoſe who ſuddenly join an inſurrection, being ignorant of their deſign, appear to be more inconſiderate than wilful or miſchievous, ſuch as throwing up their hats, or hallooing with the mob, this will fall under the ſame lenient conſideration.

Burnet's MS. 14. Moor, 621. 1 Hawk. ch. 17. f. 26.

Joining from fear. 1 MS. Sum. 14. Foſt. 216. 1 Hale, 49. 56, 57. 139. 1 Hawk. ch. 17. f. 24.

But if the joining with rebels be from fear of preſent death, and while the party is under actual force, ſuch fear and compulſion will excuſe him. It is incumbent, however, on the party ſetting up this defence to give ſatisfactory proof that the compulſion continued during all the time that he ſtaid with the rebels. It may perhaps be impoſſible to account for every day, week, or month; and therefore it may be ſufficient to excuſe him if he can prove an original force upon him, that he in earneſt attempted to eſcape and was prevented, or that he was ſo narrowly watched, or the paſſes ſo guarded, that an attempt to eſcape or to refuſe his aſſiſtance would have been attended with great difficulty and danger; and, if the circumſtance will admit of it, that he quitted the ſervice as ſoon as he could: ſo that upon the whole he may fairly be preſumed to have continued amongſt them againſt his will, though not conſtantly under an actual force or fear of immediate death. This is agreeable to the rule in Oldcaſtle's caſe; where thoſe who were charged as his accomplices in rebellion were acquitted by the judgment

1 Hale, 50.

of

of the court, becauſe the acts were found to be done pro timore mortis, et quod receſſerunt quam cito potuerunt. In this reſpect there is no diſtinction between ſerving as an officer or private man, further than the accepting a command in a rebel army is a ſtronger evidence of willingneſs than the other. But an apprehenſion, though ever ſo well grounded, of having property waſted or deſtroyed, or of ſuffering any other miſchief, not endangering the perſon of the party, will be no excuſe for joining or continuing with rebels; otherwiſe it would be in the power of any leader of a rebellion to indemnify all his followers. It was ſo ruled in the caſe of M'Growther, and of many of the Scotch priſoners, on the ſpecial commiſſion, in Surry, in 1746. In M'Growther's caſe, beſides the threat of burning his property, it appeared that he and twelve other tenants of the Duke of Perth, being ſummoned to meet him, appeared on the third ſummons, on the 28th of Auguſt, when the Duke propoſed to them to take arms and follow him into the rebellion; that they all refuſed to go; whereupon they were told that they ſhould be forced, and cords were brought by the Duke's party (about 20) in order to bind them; and that then the priſoner and about ten more went off, ſurrounded by the Duke's party. Lord C. J. Lee obſerved to the jury, that the only force pretended to by the priſoner was on the 28th of Auguſt, and that he continued with the rebels, and bore a commiſſion in their army, till the 30th of December following. He was convicted, but not executed. In all the like caſes of the Scotch rebels, the matter of fact, whether force or no force, and how long that force continued, with every circumſtance tending to ſhew the practicability or impracticability of an eſcape, was left to the jury on the whole evidence.

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Gordon's caſe, 23d Oct. 1746, at St. Margaret's Hill. cor. Lee, C. J. Wright, Reynolds, and Foſter, Juſtices, Serjeant Foſter's MS. 43. 1 MS. Sum. 14. Foſt. 13, 14.

Alex. M'Growther's caſe, Foſt. 13, 14. 9 St. Tr. 566.

Axtell, one of the regicides who commanded the guards at the king's trial and murder, juſtified that what he did was as a ſoldier, by command of his ſuperior officer, whom it was death not to obey; but this was ruled to be no defence. In truth there was no colour for imputing any compulſion on him to be in that ſituation.

Axtell's caſe, one of the regicides, Kel. 13.

Such compulſion or fear, however, is no excuſe for any other ſort of treaſon than that of joining with rebels or enemies.

1 MS. Sum. 14. *Vide* ch. of perſons capable of crimes, tit. *Compulſion.*

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§ 16. *Giving aſſiſtance or intelligence.* Foſt. 217. 1 MS. Sum. 14. 1 Hale, 51 56. 58. Sir J. Wedderburn's caſe, Nov. 4th, 1746, Foſt. 22.

So ſending money, arms, ammunition, or other neceſſaries to rebels, will primâ facie make a man a traitor, though they ſhould be intercepted. In Sir John Wedderburn's caſe it was proved as evidence of levying war, in order to depoſe the king and ſet the pretender on the throne, that the priſoner was appointed by the pretender's ſon collector of the exciſe, and that by virtue of that appointment he did actually collect the exciſe in ſeveral places where the rebel army lay, for their uſe. Yet paying contribution to rebels to prevent the plunder of the country, or making ſubmiſſion to them when reſiſtance would be dangerous and in all probability unavailing, is excuſable; for in times of open hoſtilities the jus belli is the only practicable law. But if it appear that the party wanted the will rather than the power to deny his aſſiſtance, and there appear any marks of conſciouſneſs that he might if he pleaſed have withheld it, he is inexcuſable if upon a pretence of fear or doubt of compulſion he gives ſuch aſſiſtance. It ſeems much more difficult to frame a caſe where the act of ſending intelligence to rebels can be palliated upon the plea of neceſſity. It partakes more purely of the will than almoſt any other act of this kind; and though it ſhould happen to fail of the effect intended, by not reaching the place of its deſtination, ſtill the treaſon is complete; for the party did all in his power.

Gregg's caſe, MS. Tracy, Dod, Price, and Denton, 10 St. Tr. App. 77. Dr. Henſey's caſe, B. R. Tr. 31 G. 2. 1 Burr. 644. 646.

§ 17. *Conſtructive levying of war.* Ante, f. 12. 1 MS. Sum. 13, 14. Foſt. 211. 213. 1 Hale, 132, 3. 146. 148. 3 Inſt. 9, 1 Hawk. ch. 17. ſ. 25. Burnet's MS. 14. Kel. 75, 76. Poph. 122. 2 And. 42 5. 1 Vent. 251. 2 Will. 366. Ld. George Gordon's caſe, Dougl. 590.

2. Conſtructive levying of war is in truth more directed againſt the government than the perſon of the king; though in legal conſtruction it is a levying of war againſt the king himſelf. This is when an inſurrection is raiſed to reform ſome national grievance, to alter the eſtabliſhed law or religion, to puniſh magiſtrates, to introduce innovation of a public concern, to obſtruct the execution of ſome general law by an armed force, or for any other purpoſe which uſurps the government in matters of a public and general nature. On the trial of Lord George Gordon the court of King's Bench declared their unanimous opinion that an attempt, by intimidation and violence to force the repeal of a law, was a levying war againſt the king. The ſtatute in queſtion was the 18 Geo. 3. c. 60. for relieving Roman catholics from certain penalties; and the treaſonable acts given in evidence againſt the priſoner was the aſſembling a great

great multitude of people, and encouraging them to ſurround the two houſes of parliament and commit different acts of violence there and elſewhere, with a view to intimidate them to a repeal of the ſtatute. Inſurrections of this nature, though not levelled directly againſt the perſon of the king, are yet an attack upon his regal office, and tend to diſſolve all government, ſociety, and order. The king is bound in duty to enforce the acts of the legiſlature and uphold their authority: any reſiſtance, therefore, to theſe, muſt, in its conſequences, extend to the endangering of his perſon and government, by involving the ſtate in a general diſtraction; on which account this ſpecies of treaſon falls properly within the clauſe of levying war againſt the king. Upon this principle the Yorkſhire and Northumberland rioters, who oppoſed the militia laws, were convicted of high treaſon; and ſeveral of them were executed. But under this branch a bare conſpiracy to levy ſuch a war is not treaſon, unleſs the war be actually levied; in which caſe the conſpirators, as well as the actors, would be all equally guilty.

MS. Yates, J. cor. Loyd and Bathurſt, Juſtices. Ante, f. 9. Foſt. 211. Friend's caſe, 4 St. Tr. 599. Kel. 19.

Of the ſame nature is an aſſembling together for the purpoſe of deſtroying all meeting houſes or all bawdy houſes, under colour of reforming a public grievance; or an inſurrection to reduce by force the general price of victuals, to inhance the common rate of wages, to level all incloſures, to expel all foreigners, to releaſe all priſoners, or to reform by numbers or an armed force any real or imaginary grievance, of a public and general nature, in which the inſurgents have no peculiar intereſt. Againſt ſuch inſurrections magiſtrates, ſheriffs, and indeed all private perſons, may uſe force to ſuppreſs them without any ſpecial commiſſion, in the ſame manner as they may oppoſe foreign enemies coming hoſtilely into the kingdom.

1 MS. Sum. 14. Foſt. 211. 1 Hale, 132. 145, 146. 153. Kel. 70. 75, 6. Popp. 122. Cro. Car. 583. 2 And. 4, 5. 1 Ventr. 251. 2 Wilſ. 365. 1 Hawk. ch. 17. ſ. 25.

It was adjudged in Benſtead's caſe, that going in a warlike manner to Lambeth Houſe to ſurpriſe the Archbiſhop of Canterbury, who was a privy counſellor, it being with drums and a multitude of 300 perſons, was treaſon. The true ground of this reſolution Mr. Juſtice Foſter conſiders to have been, that the attempt was made on account of meaſures which the king had taken or was then purſuing, at the inſtigation, as the rabble imagined, of the archbiſhop; in conſequence of which they had deliberately, and upon a public invitation, attempted by numbers and open force to

Benſtead's caſe, 16 Car. 2. Cro. Car. 583. 1 Hale, 141. 152. Foſt. 211, 212.

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to revenge themſelves upon the privy counſellor for the acts of the ſovereign. Perhaps it would be ſtating it more correctly to ſay that it was an attack upon the king and his government in the perſon of his privy counſellor: but without the help of ſome ſuch ſuppoſition the ſame learned judge thought there was nothing in the caſe as reported which amounted to high treaſon.

Caſes of Damaree and Purchaſe. Foſt. 213. MS. Tracy, 16. 17. poſt. S. C. 8 St. Tr. 218. 247. 268. 285. 290.

Damaree and Purchaſe were indicted ſeverally, for that they, with a multitude of people, to the number of 500, armed and arrayed in a warlike manner, &c. did traiterouſly levy war, &c. It appeared, that during Dr. Sacheverell's trial in 1709 the rabble, who had attended him from Weſtminſter to his lodgings in the Temple, continued there together for a ſhort time, crying, among other cries of the day, "*down with the preſbyterians.*" At length a perſon unknown propoſed to pull down the meeting houſes; and thereupon the cry became general, "*down with the meeting houſes;*" and ſome thouſands immediately moved towards a meeting houſe of Mr. Burges, a proteſtant diſſenting miniſter; the defendant Damaree, a waterman, putting himſelf at the head of them, and crying, "*come on, boys; I'll lead you; down with the meeting houſes.*" They ſoon burnt Mr. Burges's; after which they agreed to proceed to *the reſt of the meeting houſes:* and hearing that the guards were coming to diſperſe them, they agreed for the greater diſpatch to divide into ſeveral bodies, and to attack different houſes at the ſame time; many of which were that night in part demoliſhed, and the materials burnt in the ſtreets. Damaree put himſelf at the head of one of theſe parties, and demoliſhed a meeting houſe in Drury Lane, ſtill crying that "*they would pull them all down that night.*" While the materials of this houſe were burning in the ſtreet, Purchaſe, who had not, for aught appeared, taken part in any prior outrage, came up to the fire very drunk, and with a drawn ſword in his hand encouraged the rabble, and incited them to reſiſt the guards, who juſt then came up to diſperſe them; he himſelf aſſaulting the commanding officer and others with his weapon; and calling to the rabble, "*come on boys, I'll loſe my life in the cauſe; I will fight the beſt of them.*" All the judges preſent agreed that Damaree was guilty of the treaſon charged; for there was a riſing

with an avowed intention to demoliſh all meeting houſes in general, which was carried into execution as far as they were able. It was a declaration by the rabble againſt the act of toleration, and an attempt to render it ineffectual by numbers and open force. Damaree was accordingly convicted. In regard to the caſe of Purchaſe, there was ſome diverſity of opinion among the judges preſent at the trial; becauſe it did not appear that he had any concern in the original riſing, or was preſent at or active in any of the outrages of that night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident for aught appeared to the contrary. The jury therefore, by direction of the court, found a ſpecial verdict to the effect already mentioned. All the judges, on conſideration, agreed in the guilt of Damaree; and all but three held the ſame opinion in reſpect to Purchaſe; becauſe the rabble were traiterouſly aſſembled and in the very act of levying war when he joined them, and encouraged them to proceed, and aſſaulted the guards who were ſent to ſuppreſs them. All this being done in defence and ſupport of perſons engaged in the very act of rebellion involved him in the guilt of that treaſon in which the others were engaged. The ground of the opinion of the three diſſenting judges was, becauſe it was not directly found that he aided and aſſiſted the traitors; though they agreed that the mob were continuing their act of treaſon when Purchaſe joined them. But from what I have before ſtated this does not ſeem neceſſary, if the party be found to have done any act towards the execution of the traiterous deſign. For whoever joins deliberately in the execution of any unlawful act muſt abide the conſequences at his peril.

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Trevor, C. J. Powell, J. and Price, B.

MS. Tracy, 17.

Ante, f. 15.

§ 18.

But where the object of the inſurrection is a matter of a private or local nature, affecting or ſuppoſed to affect only the parties aſſembled, or confined to particular perſons or diſtricts, it will not amount to high treaſon, although attended with the circumſtances of military parade uſually alleged in indictments on this branch of treaſon. As if the riſing be only againſt a particular market, or to deſtroy particular incloſures, to remove a local nuiſance, to releaſe a particular priſoner, unleſs impriſoned for high treaſon, or even to oppoſe the execution of an act of parliament, if it only

Inſurrections of a private or local nature.

1 MS. Sum. 14. Foſt. 209, 210. Burnet's MS. 14. 1 Hale, 133, 4: 140. 9. 1 Hawk. ch. 17. ſ. 25. and other authorities under the former ſection.

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only affect the diſtrict of the inſurgents; as in the caſe of a turnpike act.

Foſt. 210. 2 Hale, 143—146.

Upon the ſame principle, and within the ſame equitable conſtruction of the ſtatute of treaſons, Mr. Juſtice Foſter ſays it was rightly holden by five of the judges, that a riſing of the weavers in and about London, to deſtroy all engine looms, machines which enabled thoſe of the trade who made uſe of them to underſell the reſt, did not amount to a levying war; though they aſſembled for ſeveral days together in conſiderable bodies, at different places, armed with clubs, and ſuch other weapons as they could get, and committed violent outrages; breaking into houſes and burning the looms, not only in London but in the adjacent counties, and reſiſting and affronting the magiſtrates and peace officers. For thoſe judges conſidered the whole affair merely as a private quarrel between men of the ſame trade about a particular engine, which thoſe concerned in the riſing thought detrimental to them in particular; and in which they had, in truth, a ſpecial intereſt: and though five other judges ſeemed to think it treaſon, yet finally the defendants were only proſecuted for a riot.

Riot Act, 1 Geo. 1. ſt. 2. c. 5. *Vide* Poph. 122.

I cannot take leave of this ſubject without noticing a modern act of parliament, I mean the riot act, which certainly cannot be deemed to have altered the law of treaſon in the reſpect above mentioned; but muſt be underſtood as confined to thoſe private and particular cauſes of riſings which do not fall within the clauſe of levying war, according to the conſtruction which has been given of that law. And this I conceive to be conſonant to the opinion delivered by eleven judges againſt Lord Hale, in Cotton's caſe, upon the application of a ſimilar act of the 1 *M. c.* 12. For though the preamble of the riot act notices that many *rebellious* riots and tumults had then of late taken place, yet, in the enacting part, it only attaches upon perſons *unlawfully, rioutouſly, and tumultuouſly* aſſembled.

Cotton's caſe, Kel. 75.

§ 19. *Within the realm.* Ante, f. 12. 1 Hale, 134—138. *Vide* poſt. ch. 4. *Offences relating to the Coin.* ſ. 6. & Co. Litt. 261.

2. The clauſe of levying war is confined to the realm. The words of the ſtat. 25 Ed. 3. are "in his realm." So the act of the 36 Geo. 3. c. 7. is confined to a compaſſing to levy war "within this realm."

The realm of England comprehends the narrow ſeas; and, therefore, if a ſubject attack the king's ſhips upon thoſe ſeas,

ſeas, it is a levying of war within his realm. It alſo extends to Wales. But Ireland (*a*) and the iſles of Man, Jerſey, Guernſey, Sark, and Alderney, though parcels of the dominions of the crown of England, are not within the realm. The ſame might be ſaid of Scotland, as to which proviſion is made by ſtat. 4 Jac. 1. c. 1. and 7 Jac. c. 1. for treaſons committed there.

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(*a*) But ſee now the late act of union with Ireland, 40 Geo. 3. See alſo the acts of union with Scotland.

It was ruled in Harding's caſe, that enliſting men to ſend over ſea to aſſiſt the king's enemies, is not within this clauſe of the 25 Ed. 3. It would have fallen moſt properly within the clauſe of adhering, but was alſo admitted as an overt act to prove the compaſſing of the king's death.

Harding's caſe, 2 Ventr. 316. Poſt. p. 78.

Poſt. 197.

But to relieve a rebel out of the realm is no treaſon.

1 Hawk. ch. 17. ſ. 28. Sum. 15. 4 Blac. Com 83.

V. "*If a Man be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm or elſewhere,*"

§ 20. *Adhering to the King's Enemies.*

he is alſo declared guilty of high treaſon by the ſtat. 25 Ed. 3.

25 Ed. 3. ſt. 5. c. 2.

And it is further provided by ſtat. 2 & 3 Ann. c. 20. ſ. 34. that if any officer or ſoldier ſhall, out of England or upon the ſea, correſpond with any rebel or enemy, or give them advice or intelligence, by letters, meſſages, ſigns, tokens, or otherwiſe, or ſhall treat or enter into any condition with them, without authority ſo to do, he ſhall be guilty of high treaſon. And, by the general mutiny acts, for theſe and other like offences, the offender ſhall ſuffer death, or ſuch other puniſhment as a court martial ſhall award.

2 & 3 Ann, c. 20. *Soldiers correſponding with Enemies.*

I ſhall firſt enquire who is an enemy; next, what is an adherence; and then I ſhall conſider the analogous offence of ſerving foreign ſtates without licence from the crown.

1. By the term enemy is always to be underſtood a foreign power owing no allegiance to the crown, and in a ſtate of open hoſtility with us; though perhaps war may not have been regularly declared between the reſpective countries: and therefore, in an indictment on this clauſe, it is ſufficient to aver, that the prince or ſtate adhered to *was an enemy*. And the queſtion, Whether there be war or not between ſuch power and our king is purely a queſtion of fact, triable by the jury; and public notoriety is ſufficient evidence of it.

Who an Enemy. 4 Blac. Com. 83. 1 Hale, 159. 162, 163, 4. ante, ſ. 4. Poſt. 219, 220. 1 MS. Sum. 15. 24. 2 Ventr. 316.

(*Vide* Wells v. Williams, 1 Ld. Raym. 283.)

Alſo,

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Alſo, if the ſubject of a foreign ſtate in amity with us acts in a hoſtile manner againſt us, without commiſſion from his ſovereign, or under commiſſion from a ſtate at enmity with us, he is ſo far an enemy, that a ſubject of England adhering to him is a traitor. But inciting foreigners, not actually at war with us, to invade the kingdom, does not, for the reaſon given, fall within this branch of the ſtatute, but under that of compaſſing the king's death. Yet, perhaps, if it could be ſhewn that a war was commenced upon ſuch an incitement, it would fall as much within the true conſtruction of this clauſe, as one who counſels the levying of war is guilty of that offence, if the war be actually levied.

Foſt. 196.
1 Hale, 169.

Ante, f. 9.

§ 21. *What an adherence.*

2. In conſidering what ſhall be deemed an adherence to the king's enemies, much of what has been already ſaid under the head of levying war is equally applicable. Thus, every ſpecies of aid or comfort, in the words of the ſtatute, which, when given to a rebel within the realm, would make the ſubject guilty of levying war; if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies; though in the caſe of giving aid to enemies within the realm, a ſubject might in ſome inſtances be brought within both branches of the act. It is neceſſary in an indictment on this branch of the ſtatute to aver that the perſons adhered to were the king's enemies, as well as that the defendant adhered to them; but it is not neceſſary to allege expreſsly that ſuch adherence was againſt the king, that being apparent; nor is it more neceſſary under this, than under the former clauſe, that the parties ſhould come to an action; but the ſpecial manner of adhering muſt be ſet forth.

Ante, f. 16.
1 Hale, 56.
Vide 4 Blac. Com. 183.
Vaughan's caſe, 5 St. Tr. 37.
Foſt. 216, 217.
1 Hawk. ch. 17. ſ. 28.

1 Hawk. ch. 17. ſ. 28.
Vaughan's caſe, 5 St. Tr. 36.
Vide 2 Ventr. 316.
Ante, f. 12.
Foſt. 218.

Harding's caſe, 2 Ventr. 315.
Foſt. 197.
Ante, p. 77.

Harding having raiſed men in England with intent to dethrone the king, and ſent them abroad to join the French, then at open war with us, for that purpoſe, was held guilty of adhering to the king's enemies, and of compaſſing his death. In Lord Preſton's caſe, the compoſing, procuring, and ſecreting treaſonable papers, and taking them with him in a boat, to go on board a veſſel bound to France, where they were to be uſed for treaſonable purpoſes, were laid as overt acts of both thoſe ſpecies of treaſon. Indeed all treaſonable correſpondence with an enemy falls within the clauſe

Lord Preſton's caſe, 4 St. Tr. 409, &c.
Foſt. 197.

Foſt. 217.

of

Ch. II. § 21. *Adhering to the King's Enemies.*

of adhering, as it has been ſhewn to do within the clauſe of compaſſing the king's death. At a meeting of the judges upon the caſe of Gregg, one of the clerks of Mr. Secretary Harley's office, who ſent intelligence by letters to Monſieur Chamillard, ſecretary of ſtate in France, which letters were intercepted at the poſt office here; the ſending ſuch letters was reſolved to be an overt act of both ſpecies of treaſon, as it was laid in the indictment, though the letters never came to the enemy's hands. And in Henſey's caſe, under the ſame circumſtances, the court cited that opinion with approbation, and adopted it.

Ante, f. 9. 12th Jan. 1707, Gregg's caſe, MS. Tracy, 16. MS. Price, Dod, and Denton. 1 MS. Sum. 14. Foſt. 218. 10 St. Tr. App. 77. Dr. Henſey's caſe, 1 Burr. 646.

In like manner in Stone's caſe, the indictment charged as an overt act of adhering and of compaſſing, that the priſoner conſpired with J. Harford Stone, W. Jackſon, and others unknown, to collect intelligence within England and Ireland of the diſpoſition of the king's ſubjects in caſe of an invaſion of either country, and to communicate ſuch intelligence to the enemy, for their aſſiſtance and direction in their conduct and proſecution of the war. Some part of the written intelligence applicable thereto, which was given in evidence, was found in the hands of Jackſon, one of the conſpirators. The tendency of parts of the papers was to adviſe the enemy againſt an invaſion of England, by repreſenting the improbability of its being attended with any ſucceſs, from the general diſpoſition of the people; and this was relied on by the priſoner's counſel, as ſhewing that they were ſent with a good intent, in order to avert the danger of ſo great a calamity. But all the court ſaid, that the jury were to judge from all the circumſtances, whether the intelligence had been ſent with that view. For however beneficial the effect of ſuch intelligence might be, yet, if it were ſent in order to aſſiſt an enemy in their counſels, and to enable them the better to ſhape their defence or attacks, it was undoubtedly high treaſon under both the clauſe of adhering and of compaſſing.

Rex v. Wm. Stone, at the bar of the Court in Hil. 36 Geo. 3. MS. & 6 Term Rep. 527. 529. *Vide* poſt. S. C.

(*Vide* Rex v. Henſey, ſupra.)

It is alſo an adherence to the king's enemies in a ſubject of England making war on the king's allies, engaged with him againſt the common enemy, though no act of hoſtility be committed againſt the king or his forces; for by this the enemy is ſtrengthened and the king weakened.

Vaughan's caſe, 5 St. Tr. 37. Foſt. 220.

In

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In Joſeph Evans' caſe it became a queſtion, How far the overt act laid under this branch of treaſon ſhewed a traiterous intent againſt the king, or was only a piratical attempt againſt the ſubject? He was convicted at an admiralty ſeſſions holden by virtue of 28 Geo. 2., whereby treaſons on the high ſeas, in time of war, by adhering to the king's enemies, are to be tried in like manner as piracies. The indictment, after ſetting forth that there was a war between the Engliſh and French, charged that the priſoner did adhere to the king's enemies, and in proſecution of ſuch adherence did, in a certain armed veſſel called the Eſcamatour, with certain perſons unknown, hoſtilely go a cruiſing, with intent in maritime places to ſeize and take the ſhips, &c. of our ſovereign lord the king and his ſubjects. Upon a conference among the judges, on ſome doubts in the caſe, a difficulty occurred at firſt, whether the overt act was ſufficiently charged; for it was ſaid that it ſtood in an equivocal light, whether the intent might not be to commit acts of piracy. But it being obſerved, that it was laid, that the priſoner went a cruiſing to take the ſhips of *the king* as well as of the ſubjects, it made it clear that it was an adherence to the enemy; in which opinion all concurred. In this reſpect it was compared to laying as an overt act of compaſſing the king's death, that they conſpired or agreed to ſeize his guards. But this and any other ſpecies of adherence on the high ſeas may, by the proviſions of the ſtat. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30., be tried as piracy under the admiralty commiſſion, holden by virtue of the ſtat. 28 H. 8. c. 15.

Evans' caſe, M. 23 Geo. 3. MS. Gould, J. *Vide* S. C. chap. *Piracy.*

Vide title *Piracy.*

Ante, f. 15.

It may alſo be obſerved, that the ſame excuſes of compulſion and neceſſity, which may be made for one who has joined or given aid to rebels or enemies within the realm, will alſo apply in the caſes above alluded to.

§ 22. *Refuſal to ſerve againſt Enemies.* 1 Hawk. ch. 22. ſ. 2. 4 Blac. Com. 122.

But the mere act of refuſing perſonal aſſiſtance to the king, either againſt rebels or an invading enemy, amounts not to an adherence within the ſtatute, though undoubtedly it is a high miſdemeanor, and puniſhable by fine and impriſonment.

Refuſal to return home. 1 Hale, 165. 167.

So Engliſhmen living in a foreign country at the time of a rupture with us, and continuing there afterwards, are not on that account adherents to the king's enemies, unleſs they voluntarily

voluntarily ſwear fealty to them, or actually aſſiſt them in the war; or, at leaſt, unleſs they refuſe to return home upon priyy ſeal or proclamation, and notice thereof, though ſuch a refuſal is only evidence of adhering. The caſe of foreigners reſiding here during a war between their country and ours has been before ſufficiently conſidered: They may undoubtedly be guilty of treaſon in adhering to their own country.

Ch. II. § 22. *Refuſal to ſerve againſt Enemies.*

Dy. 296. a.

Ante, f. 4.

§ 23.

There is another offence againſt the crown and ſtate, which, being analogous to thoſe I have been juſt deſcribing, I ſhall advert to in this place; although, being as well applicable to a ſtate of peace as of hoſtility, it does not fall under the notion of high treaſon, unleſs done in aid of rebels or enemies: Yet it is, properly ſpeaking, an offence againſt allegiance. This is,

Vide 4 Blac. Com. 101.

Serving or procuring others to ſerve Foreign States.

Serving Foreign States.

4 Blac. Com. 122.

1 Hawk. ch. 22. ſ. 2, 3.

Entering into the ſervice of any foreign ſtate without the conſent of the king, or contracting with it any other engagement which ſubjects the party to an influence or control inconſiſtent with the allegiance due to our own ſovereign, ſuch as receiving a penſion from a foreign prince without the leave of the king, is at common law a high miſdemeanor, and puniſhable accordingly. Such alſo is the diſobeying of the king's command to a ſubject abroad to return home; or his writ of ne exeat regno to a ſubject at home, commanding his ſtay.

Dy. 296. a.

3 Jac. 1. c. 4. ſ. 18.

Further, by ſtat. 3 Jac. 1. c. 4. it is enacted, "that every ſubject who ſhall go out of the realm of England to ſerve any foreign prince, ſtate, or potentate, or ſhall paſs over the ſeas, and there ſhall voluntarily ſerve ſuch prince, &c. not having before taken the oath of obedience (therein preſcribed), ſhall ſuffer as a felon." And (ſ. 19.) "if any gentleman or perſon of higher degree, or any perſon who has borne any office, place, or charge in camp or army, or company of ſoldiers, or conductor of ſoldiers, ſhall after go voluntarily out of the realm to ſerve any foreign prince, &c. or ſhall voluntarily ſerve any ſuch, before he be bound in a bond with two ſureties not to be reconciled to the ſee of Rome, nor to enter into any conſpiracy againſt the king, he ſhall be guilty of felony."

(The ſtat. 1 W. & M. ſt. 1. c. 8. gives a new oath.)

Ch. II. § 23. *Serving Foreign States.*

The offences are the going out of the realm with intent to ſerve a foreign ſtate, although there be no ſervice in fact, and the actual ſerving, after having gone out of the realm upon that or any other occaſion. And the trial is to be where the offence is committed, which is at the place where the party paſſed out of the kingdom.

3 Inſt. 80.

9 Geo. 2. c. 30.

By ſtat. 9 Geo. 2. c. 30. "If any ſubject of Great Britain ſhall enliſt or enter himſelf, or if any perſon ſhall procure any ſubject to enliſt or enter himſelf, or hire or retain any ſubject with intent to cauſe him to enliſt or enter himſelf, or procure any ſubject to go beyond ſeas, or embark with intent and in order to be enliſted to ſerve any foreign prince, ſtate, or potentate, as a ſoldier, without his majeſty's licence under his ſign manual; every ſuch offender ſhall on conviction be guilty of felony without benefit of clergy." But if the perſon ſo enliſted or enticed to go beyond ſeas, in order to be enliſted as a non-commiſſioned officer or private ſoldier, ſhall diſcover upon oath to a magiſtrate his ſeducer, within 14 days after ſuch enliſting or agreement to go beyond ſeas, ſo that he may be apprehended and convicted, ſuch perſon ſhall be indemnified."

29 Geo. 2. c. 17.

And by ſtat. 29 Geo. 2. c. 17. If any ſubject ſhall take or accept of any military commiſſion, or otherwiſe enter into the military ſervice of the French king as a commiſſioned or non-commiſſioned officer, without ſuch licence under the king's ſign manual, he ſhall ſuffer death as a felon, without benefit of clergy.

S. 5. inflicts a forfeiture of 500l. on any ſubject accepting a commiſſion in the Scotch brigade in the ſervice of the States General, unleſs within ſix months he take and ſubſcribe the oaths of allegiance and abjuration, and certify the ſame to the ſecretary at war, &c.

By ſ. 4. for removing doubts upon the ſtat. 9 Geo. 2. it is further provided "That if any ſubject has or ſhall engage, contract, or agree, within Great Britain or Ireland, to go beyond ſeas, or embark with intent or in order to enliſt or enter himſelf to ſerve as a ſoldier in any foreign ſervice, though no enliſting money be actually paid to or received by him; or if any perſon has or ſhall hire, retain, engage, or procure any ſubject, though no enliſting money has or ſhall actually be paid to or received by him, to agree to go beyond ſeas, or embark with intent to be enliſted to

ſerve

ſerve any foreign prince, &c. as a ſoldier, without the king's licence firſt had; every ſuch offender ſhall be adjudged guilty of felony, without benefit of clergy."

Ch. II. § 23. *Serving Foreign States.*

Proviſion is alſo made by both of the above acts of Geo. 2., that offences againſt them committed out of the realm may be alleged to be committed and may be inquired of and tried in any county in England.

Trial.

VI. *Counterfeiting the Seals.*

§ 24. *Counterfeiting the Seals.*

The next head of treaſon relates to the king's ſeals. By the ſtat. 25 Ed. 3. it is further declared to be treaſon "if a man counterfeit the king's great or privy ſeal;" and by ſtat. 1 Ma. c. 6. "If any perſon falſely forge or counterfeit the queen's ſign manual, privy ſignet, or privy ſeal, ſuch offence ſhall be deemed high treaſon, and the offenders therein, their counſellors, procurers, aiders, and abettors, being convicted according to law, ſhall be adjudged traitors."

25 Ed. 3. ſt. 5. c. 2. 1 Hawk. ch. 17. ſ. 53. 1 Hale, 178. 184. 275. 1 Ma. ſt. 2. c. 6. re-enacting the 27 H. 8. c. 2. which had been repealed by 1 Mar. c. 1. though ſaved by 1 Ed. 6. c. 12. ſ. 8.

By ſtat. 7 Ann. c. 21. ſ. 9. To counterfeit the ſeals uſed and continued in Scotland, according to the 24th article of the union, is high treaſon.

7 Ann. c. 21. ſ. 9.

This is a ſpecies of the crimen falſi, or forgery; and yet it differs conſiderably from the legal conſtruction of that offence, and therefore requires ſeparate notice. It was treaſon at common law, and the judgment was to be drawn and hanged: but now the judgment is the ſame as in all other treaſons I have before touched upon.

Vide 1 Hale, 178, 179. 187. Bract. Lib. 3. c. 3. ſ. 2. Flet. lib. 1. c. 22. 4 Blac. Com. 89. Ryl. Plac. Parl. 542. Cro. Car. 383. 1 Ventr. 254.

Two points are to be conſidered;

1. *What ſhall be ſaid to be the great or privy ſeal, &c.*
2. *What is a counterfeiting of the ſame?*

1. The great ſeal of England is that by which the king diſpenſes the principal acts of his government, and the adminiſtration of juſtice. It conſiſts ordinarily, ſays Lord Hale, of two impreſſions, the principal one (properly called the great ſeal) with the king's effigies ſtamped on it; the other commonly called pes figilli, and formerly le targe, being the impreſſion of the king's arms in a target, which is uſed in matters of leſs moment. By the very delivery of this ſeal the office of keeper of the great ſeal is conſtituted,

Great Seal. 1 Hale, 170.

Ch. II. § 24 *Counterfeiting the Seals.*

which in modern times has been to the lord chancellor, when any ſuch officer has been appointed, otherwiſe to certain commiſſioners, who exerciſe the functions of that office; and in ſome few inſtances to a ſingle perſon with the title only of lord keeper of the great ſeal.

40 Geo. 3. c. 67. ſ. 2.

By the firſt article of the union with Ireland the ſtile and title appertaining to the imperial crown of the united kingdom and its dependencies, and alſo the enſigns armorial flags and banners thereof ſhall be ſuch as his majeſty, by his royal proclamation under the great ſeal of the united kingdoms, ſhall appoint. And by ſ. 3. of the act it is enacted, that the great ſeal of Ireland may, if his majeſty think fit, after the union, be uſed in like manner as before, except where otherwiſe provided by the articles, within Ireland.

Privy Seal. 1 Hale, 172.

The privy ſeal is ordinarily a warrant for paſſing things under the great ſeal; ſometimes a warrant to iſſue money, and for other purpoſes. It is for the moſt part in the cuſtody of the lord keeper of the privy ſeal; but ſometimes has been holden by commiſſioners.

Privy Signet. 2 Inſt. 556. 2 Blac. Com. 347. *Vide* ſt. 27 H. 8. c. 11. 1 Hale, 171, 172.

The privy ſignet is one of the king's ſeals, uſed in ſealing his private letters and ſuch grants as paſs his majeſty's hand by bill ſigned with the ſign manual. It is in the cuſtody of the king's principal ſecretary, who has four clerks of the ſignet-office attending on him; and it is made uſe of ſometimes as a warrant to the privy ſeal, as this latter is to the great ſeal.

There are other ſeals of the king, ſuch as thoſe appertaining to the ſeveral courts; thoſe of the King's Bench and Common Pleas in the cuſtody of the reſpective chief juſtices; that of the Exchequer holden by the chancellor of the Exchequer; thoſe of the dutchy and county palatine of Lancaſter in the cuſtody of their reſpective chancellors; alſo the ſeals of the county palatine of Cheſter, and of the ſeveral juſtices of aſſize oyer and terminer and gaol delivery; though theſe latter ſometimes make their precepts under their own ſeals; alſo the king's ſeals of ſtatutes and recognizances, and the ſeal of the cocket. The counterfeiting of any of theſe was, before the 25 Ed. 3., ſuppoſed to be treaſon, and afterwards felony; but it is now ſettled only to be a high miſdemeanor, puniſhable by fine, impriſonment, and pillory.

1 Hale, 174.

1 Hale, 179—183.

Seals how deſtroyed. 1 Hale, 176, 7. *Vide* 6 Ann. c. 7.

Upon the demiſe of the king, though the office of keeper of the great ſeal expires, yet the ſame great ſeal continues to

ſ. 8. for continuing officers, &c. for ſix months after the demiſe of the crown, unleſs ſooner diſplaced.

to be the great ſeal of England till another be made and delivered. Formerly public proclamation was made in caſe of a change of the ſeal, though now a memorandum only is entered on the cloſe rolls. But even after the making and delivery of a new ſeal, and the breaking of the old one, yet the counterfeiting of the latter, and applying it to an inſtrument of the date wherein it was in uſe, or to an inſtrument without date, is high treaſon.

Ch. II. § 24. *Counterfeiting the Seals.*

Burnet's MS. 18. 1 Hale, 177. Poſt.

§ 25. *What a counterfeiting.*

2. As to what ſhall be ſaid to be a counterfeiting; although this is evidently a ſpecies of the crimen falſi or forgery, and might naturally have been ſuppoſed to be governed by the ſame rules, yet the difference is conſiderable; for though the ſculpture of the inſtrument, which is in truth the great ſeal, be exactly counterfeited, yet if it be not uſed or applied to ſeal any thing, though intended for that purpoſe, the offence is not complete: but it ſeems there muſt be an impreſſion made in wax, in teſtimony of ſome writing; otherwiſe it is no more than a mere intent or compaſſing to counterfeit the ſeal, and is only puniſhable as a high miſdemeanor.

Ante, p. 83. 1 Hale, 181. 183. 1 Hawk. ch. 17. ſ. 50.

Again, it is ſaid that the affixing the true great ſeal by the chancellor or any caſual poſſeſſor of it, without warrant, or the affixing it to a wrong patent knowingly, though a great miſpriſion, is no treaſon within the act of Ed. 3. (nor, by conſequence, within that of Mary); becauſe this is not a counterfeiting of the ſeal. For the ſame reaſon the raſing of one manor out of a patent and inſerting another, or any artificial removing of the true writing and adding new matter; or even, it is ſaid, the taking off the wax impreſſed with the great ſeal from a true patent, and affixing it to a writing importing to be a grant from the king, are none of them high treaſon, but only great miſpriſions. It was formerly queſtioned whether theſe inſtances did not amount to high treaſon, and many caſes are noticed by Lord Coke and Lord Hale upon this ſubject; but upon the whole, whatever the offence might have been before the ſtatute of the 25 Ed. 3., and however in ſound ſenſe and a juſt eſtimate of guilt there is no kind of difference between the offence of one who puts a true ſeal to a falſe patent, and of one who forges the ſeal itſelf; yet ſince that ſtatute which negatives all other treaſons than thoſe

1 MS. Sum. 22. 1 Hale, 183. 3 Inſt. 16. 4 Blac. Com. 83. 1 Hawk. ch. 17. ſ. 51, 52. Leak's caſe, Kel. 80.

Vide 1 Hale, 181, &c. 3 Inſt. 12, 16. and Leak's caſe, 12 Co. 16. Robinſon's caſe, 2 Rol. Rep. 51.

Ch. II. § 25. *Counterfeiting the Seals.*

therein enumerated, and the only treaſon therein deſcribed, touching this matter, is confined to the counterfeiting the ſeal itſelf; it ſeems to have been long ago agreed, and muſt be taken for law at this time, that none of the above mentioned inſtances of miſuſer of the ſeals are within the meaning of that act. This ſeems to be one of thoſe caſes where, according to the caution given in the ſtatute of treaſons, recourſe ſhould be had to the advice of parliament.

And herein conſiſts the difference between this offence and forgery, properly ſo called; that in the latter the crime conſiſts in the falſification of the *inſtrument*, and therefore if any part of it be falſe it is not the ſame inſtrument which it purports to be: but here the crime conſiſts wholly in the falſification of part of the inſtrument, namely the ſeal; and therefore if that be genuine, however falſe the inſtrument to which it may be applied, at leaſt the party cannot be ſaid to have counterfeited the ſeal, in the words of the act of Edward 3. Hence it is that in moſt, if not in all, of the acts which have paſſed to protect the property of public companies, proviſion has been made not only againſt counterfeiting their common ſeals but all thoſe inſtruments under their common ſeals, which were intended to be protected.

1 MS. Sum. 22. 1 Hale, 178. 184.

It has been determined, however, that ſplitting the ſeal and cloſing it again to a falſe patent is a counterfeiting, and this upon the principle above adverted to; becauſe this is an alteration of the ſeal itſelf. And where the ſeal is ſubſtantially counterfeited, the adding or omitting of a crown, the leaving out words in the ſtile or adding others, or making any other minute variations in the counterfeit, which is often done purpoſely, and by way of eluding the law, will not alter the caſe; as was ruled in Robinſon's caſe, upon an indictment under the ſtatute of Mary for counterfeiting the privy ſignet. The diſparity, however, may be ſo great between the true and falſe ſeal that it would not amount to a counterfeiting within the ſtatute, as if it be evident to the view of every man's eye. Neither would it if a man were to counterfeit the ſeal of one prince to a patent ſuppoſed to be granted in the time of another; or to a ſuppoſed patent of the ſame prince after a new ſeal had been made and delivered; if, ſays Lord Hale, the difference appear very legible and conſpicuous; for at the time whereunto it relates there was no ſuch great ſeal in being. In regard to the

Robinſon's caſe, 2 Rol. Rep. 50.

Vide 1 Hale, 211. 215.

the queſtion of variance the ſame rule muſt govern as in caſe of coining, where it was ruled in Welſh's caſe, by all the judges, to be a queſtion of fact for the jury to determine, Whether or not the counterfeit were made to reſemble the real coin?

Ch. II. § 25. *Counterfeiting the Seals.*

R. v. Welſh, Hertford Lent Aſſizes, 1785, and in Eaſter term following; MS. Jud. Gould & Buller, Js. and *vide* R. v. Jones, tit. Forgery.

All aiders and conſenters to the counterfeiting of the great or privy ſeal are within the act of Edward 3.; and that of Mary extends to ſuch in terms. But receivers or aiders after the fact are not within the words of either: and it was always doubtful how far the ſtat. of Ed. 3. extended to them by implication; which doubt is rather ſtrengthened by the ſtat. of Mary, which expreſsly mentions ſuch as are in ſubſtance acceſſaries before, and does not mention receivers.

§ 26. *Accomplices.* 1 MS. Sum. 22. 1 Hawk. ch. 17. ſ. 49. 1 Ma. ſt. 2. c. 6. Ante, ſ. 24. 12 Co. 81, 2. (3 Inſt. 16. *ſed. vide* Ibid. 138.) Poſt. ſ. 35.

VII. *High Treaſon againſt the King's Officers.*

By the 25 Ed. 3. "If a man ſlay the chancellor, treaſurer, or the king's juſtices of one bench or the other, juſtices in eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places, doing their offices," it is declared high treaſon.

§ 27. *High Treaſon againſt the King's Officers.* 25 Ed. 3. ſt. 5. c. 2.

By the 7 Ann. c. 21. ſ. 8. to ſlay any of the lords of ſeſſions, or juſticiary of Scotland, in the exerciſe of their office, is high treaſon.

7 Ann. c. 21. ſ. 8.

1ſt. The ſtatute of Edward 3. extends to no other officers of ſtate but thoſe who are expreſsly mentioned; and therefore the lord ſteward, conſtable, or marſhal are not included.

To whom it extends. 3 Inſt. 28. 1 Hale, 231. 1 Hawk. ch. 17. ſ. 47.

It may ſeem extraordinary that the lord treaſurer ſhould be the only officer of ſtate named among the other high legal officers, who ſeem to have been the principal at leaſt, if not (as I think they were) the ſole objects of regard. But the lord treaſurer ſeems to have been named on account of the judicial part of his office mixing with that of the other judges, which was not inconſiderable, as appears by ſeveral ſtatutes. The exchequer too was the great repoſitory of records, which were brought and laid up in the treaſury there, of which he had the ſuperintendance, from the other courts at Weſtminſter. Lord Hale doubts whether diſpatching buſineſs in the treaſurer's houſe be *in his place;* and both he and Lord Coke ſeems to confine it to ſitting in courts, as he does in the

20 Ed. 3. c. 6. 31 Ed. 3. ſt. 1. c. 12. 21 H. 8. c. 20. 31 Eliz. c. 1. 1 Hale, 232. 3 Inſt. 28. *Vide* poſt.

Ch. II. § 27. *Slaying of the King's Officers.*

court of exchequer, or exchequer chamber, or as he did in the ſtar chamber while that court ſtood. The ſtatute has alſo been ſaid to extend to juſtices of niſi prius, and gaol delivery, but not to juſtices of the peace.

Burnet's MS. 17. Holborn's Reading, 48. 1 Hale, 231.

1 MS. Sum. 22. MS. Burnet, 17. *Vide* Holborn's Reading, 48. 4 Blac. Com. 84. And *vide* Barrington on the Statutes, 137. 249. *Ut ſupra.*

It is ſaid by good authority, that among the judges the barons of the exchequer are included, becauſe in the ſame predicament with the other judges. Mr. Juſtice Blackſtone has indeed delivered a different opinion, and cited Lord Hale in ſupport of it; but the latter takes no particular notice of this caſe, but merely ſtates generally, that the ſtatute extends to no other officers than thoſe named, referring to the officers of ſtate above mentioned.

5 Eliz. c. 18. 1 Hale, 231. 4 Blac. Com 84. 4 Inſt. 84. 88. 1 MS. Sum. 22. 1 W. & M. ſt. 1. c. 22. 1 Hale, 231. Poſt. f. 30.

The ſtat. 5 of Eliz. c. 18. having declared the office of lord keeper to be the ſame to all intents as if he were lord chancellor, it ſeems that the lord keeper, at leaſt when there is no lord chancellor, is within the act. And as the office of commiſſioners of the great ſeal, when it happens to be in commiſſion, is by ſtatute declared to be the ſame, and the commiſſioners to have the ſame juriſdiction and privileges as the lord chancellor, they alſo ſeem to be within the act. But not the commiſſioners of the treaſury, for they have not the ſame power as the lord treaſurer, and therefore their office is not the ſame. But ſome other officers are included in other ſtatutes, which will be preſently mentioned.

§ 28. *At what Time.* 1 MS Sum. 22. 3 Inſt. 18. 1 Hale, 232.

2. The protection of the act is only during the times that the ſeveral officers above named are in the actual execution of their reſpective offices; that is, ſitting judicially in their places in the king's courts, where they uſually or by adjournment ſit in the adminiſtration of juſtice; for there they repreſent the king's perſon. And Lord Hale extends it to the Lord chancellor's houſe, when the ſeal is open there, and to the hearing of cauſes in his chamber, where he ſays uſe has ſufficiently obtained to give it the ſtile of *feſant ſon office.*

§ 29. *Killing.* 1 Hale, 210. 1 Hawk. ch. 17. ſ. 47. 3 Inſt. 140.

3. The ſtat of Ed. 3. is alſo confined to the caſe of *killing* ſuch officers, and extends not to a wounding or attempt to kill, unleſs death afterwards enſue from it. Yet the mere ſtriking or aſſaulting them in the execution of their office is a great miſpriſion, for which in ſome caſes of aggravation the

the offender may loſe his hand. But if many conſpire to kill any ſuch officer, and one actually accompliſh it, it ſeems treaſon in all. Ch. II. § 29. *Slaying, &c. the King's Officers.*

By the act of 3 H. 7. c. 14. the mere "compaſſing by any of the king's ſworn ſervants named in the cheque-roll of his houſehold, under the ſtate of a lord, with any perſon, to kill the king, or any lord of the realm, or other perſon ſworn to the king's council, or the ſteward, treaſurer, or comptroller of the king's houſehold," is made felony, but within clergy. According to Lord Coke, the conſpiracy muſt be plotted to be done within the king's houſehold. But the trial of offenders under this act being before a peculiar juriſdiction compoſed of officers of the houſehold, there is leſs occaſion to ſay more of it, being extraneous to the object of this treatiſe. 3 H. 7. c. 14. *Compaſſing to kill.* 3 Inſt. 37. 1 Hale, 661.

By ſtat. 9 Ann. c. 16. (which was made on occaſion of Mr. Secretary Harley being ſtabbed by Anthony Guiſcard, who was then under examination before the privy council,) it is enacted, "that if any perſon ſhall unlawfully attempt to kill, or ſhall unlawfully aſſault, ſtrike, or wound any privy counſellor in the execution of his office, in council, or in any committee of council, he ſhall on conviction be declared a felon, and ſuffer death without benefit of clergy." 9 Ann. c. 16. *Aſſaulting a Privy Councillor.*

VIII. *High Treaſon in reſpect of the Coin.*

As to offences againſt the coin, ſome of which amount to high treaſon, I ſhall treat of them altogether in another place; contenting myſelf here with enumerating the ſeveral ſtatutes by which offences of this deſcription are made high treaſon; which are 25 Ed. 3. ſt. 5. c. 2. 1 M. ſt. 2. c. 6. 1 & 2 Ph. & M. c. 11. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. 3. c. 26. 7 Ann. c. 25. 15 Geo. 2. c. 28, &c. § 30. *Coin.* Poſt. ch. 4. *Vide* 1 Hale, 340. 4 Blac. Com. 88, &c.

IX. *In reſpect of Papiſts.*

The ninth claſs of offences againſt the allegiance and duty of the ſubject to the crown relates to papiſts. Theſe, ſo far as they relate to religious matters, being in a manner grown obſolete, I ſhall barely refer to the mention which has already been made of them in the preceding chapter. They depend upon ſtatutes paſſed in the reigns of Elizabeth and James the firſt, and were conſequent upon the then recent ſeparation of the church of England from the ſee of Rome. § 31. *Papiſts.* *Vide* 1 Hale, 287. 329, &c. 4 Blac. Com. 87. 103. 112. 115. 1 Hawk. ch. 17. § 71, &c. *Vide* poſt. § 24.

Theſe

Ch. H. § 31. *Papiſts.* These animoſities are now happily buried in oblivion in a more enlightened age, and under better auſpices.

§ 32. *Proteſtant Succeſſion.* 12 & 13 W. 3 c 2. *Vide* 4 Blac. Com. 91. ante, f. 5. 1 Hawk ch. 17. f. 85, &c. 1 Ann. ſt. 2. c. 17. f. 3. (1 W. & M. ſt. 2. c. 2. & 12 and 13 W. 3. c. 2.)

X. *High Treaſon, &c. againſt the Proteſtant Succeſſion.*

Another principal branch of this offence is that which concerns the preſent proteſtant ſucceſſion to the crown, as modelled by the act of ſettlement, to which I have before adverted. To ſecure which it is enacted by the ſtatute 1 Ann. ſt. 2. c. 17. ſ. 3. that if any perſon ſhall endeavour to deprive or hinder any perſon, being next in ſucceſſion to the crown for the time being, according to the limitations of the acts of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly, adviſedly, and directly attempt the ſame by any overt act or deed; ſuch offence ſhall be adjudged high treaſon; and the offenders therein, their abettors, procurers, and comforters, knowing the ſaid offence to be done, on conviction or attainder ſhall be adjudged traitors.

6 Ann. c. 7. ſ. 1 & 2. By ſtat. 6 Ann. c. 7. If any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the acts of ſettlement, or that the kings of this realm, with the authority of parliament, are not able to make laws and ſtatutes to bind the crown and the deſcent thereof, ſuch perſon ſhall be guilty of high treaſon; and thoſe who maliciouſly and directly affirm the ſame, by preaching, teaching, or adviſed ſpeaking, ſhall be guilty of a præmunire. The ſt. 13 Eliz. c. 1. had before made a ſimilar proviſion.

17 Geo. 2. c. 39. *Correſponding with the Pretender, &c.* By ſt. 17 Geo. 2. c. 39. If any ſubject of the crown ſhall hold any correſpondence with the ſons of the pretender, or knowingly with any perſon employed by them, or ſhall remit or pay any money for their uſe or ſervice, he ſhall be guilty of high treaſon. And any of the pretender's ſons attempting to land in Great Britain or Ireland ſhall ſtand and be adjudged attainted of high treaſon.

As a further ſecurity for the bleſſings of the proteſtant government and ſucceſſion, a variety of ſtatutes have from time to time been paſſed, requiring the oaths of allegiance and ſupremacy to be adminiſtered, ſometimes in the caſes of ſuſpected perſons, but principally in the inſtance of perſons taking public offices or truſts. Moſt of theſe have been already

already noticed in the preceding chapter; and further mention of them will occur when I treat of offences relating to ſuch offices.

Ch. II. § 32. *Proteſtant Succeſſion.*

XI. *Seducing, or attempting to ſeduce others from their Allegiance and Obedience to the Crown.*

§ 33. *Withdrawing or attempting to ſeduce others from their Allegiance and lawful Obedience.*

Another and not leſs important claſs of offences than many of the foregoing is that of withdrawing or attempting to withdraw others from their allegiance to the crown, and their obedience to the king's lawful commands in their ſeveral ſtations. In all caſes falling within the legal notion of compaſſing the king's death, any attempt of this ſort, though no act be done in conſequence thereof, will amount, as was before ſhewn, to high treaſon, within the ſtat. 25 Ed. 3. But there are ſome other ſtatutes relative to this matter well worthy of particular notice. By the ſtat. 23 Eliz. c. 1. " If any one ſhall have or pretend to have power, or ſhall by any ways or means put in practice, to abſolve, perſuade, or withdraw a ſubject from his natural obedience to the crown, or to withdraw him, *for that intent*, from the religion eſtabliſhed by the queen's authority within her dominions to the Romiſh religion, or to move him to promiſe any obedience to any pretended authority of the ſee of Rome, or of any other prince, ſtate, or potentate, to be had or uſed within the queen's dominions, or ſhall do any overt act to that intent or purpoſe; or, if any perſon ſhall by any means be willingly abſolved or withdrawn as aforeſaid, or willingly be reconciled, or ſhall promiſe obedience as aforeſaid; every ſuch perſon, his procurers, and counſellors thereunto, being thereof lawfully convicted, ſhall ſuffer and forfeit as in caſes of high treaſon."

23 Eliz. c. 1. ſ. 2. Cro. Cir. Comp. 353.

It ſeems the bare pretending to ſuch a power, without any further endeavour to perſuade perſons from their allegiance, or the bare endeavour ſo to perſuade without pretending to ſuch power, is within the act.

1 Hawk. ch. 17. ſ. 78. Campion's caſe, Sav. 3.

By ſ. 3. of the ſame act, aiding or maintaining of ſuch offenders, knowing the ſame, or concealing any ſuch offence for 20 days after knowledge thereof, without diſcloſing the ſame to ſome juſtice of peace or other high officer, is made miſpriſion of treaſon.

In later times the ſame ſpecies of offence has taken another and not a leſs perilous ſhape; and it has been found neceſſary to

Endeavouring to ſeduce Soldiers or Sailors.

Ch. II. § 33. *Endeavouring to ſeduce Soldiers or Sailors.*

to paſs an act for the better prevention and puniſhment of attempts to ſeduce the army and navy from their duty and allegiance to his majeſty. For which purpoſe the ſtat. 37 G. 3. c. 70. has enacted, "That any perſon who ſhall maliciouſly and adviſedly endeavour to ſeduce any perſon ſerving in the king's forces, by ſea or land, from his duty and allegiance to his majeſty, or to incite or ſtir up any ſuch perſon to commit any act of mutiny, or to make or endeavour to make any mutinous aſſembly, or to commit any traiterous or mutinous practice whatſoever, ſhall, on conviction of ſuch offence, be adjudged guilty of felony without benefit of clergy." And, by ſ. 2. any ſuch offence, whether committed in England or on the high ſeas, may be tried before any court of oyer and terminer or gaol delivery for any county in England, as if the offence had been therein committed. Provided (ſ. 3.) that no perſon tried and acquitted, or convicted under this act, ſhall be liable to be tried again for the ſame offence or fact, as high treaſon or miſpriſion of treaſon, nor ſhall this act prevent the trial of any perſon as for high treaſon or miſpriſion of treaſon, who has not been tried for the ſame fact under this act.

37 Geo. 3. c. 70. Continued by ſeveral acts (laſtly by the ſtat. 40 G. 3. c. 16.) to ſix weeks after the commencement of the then next ſeſſions.

Trial in any county.

Richard Fuller was indicted on the above act; and the indictment ſtated that the defendant, after the paſſing of the act, and whilſt it was in force, to wit, on, &c. with force and arms, at, &c. "feloniouſly did maliciouſly and adviſedly endeavour to ſeduce one Mathew Lowe, he the ſaid M. L. then and there being a perſon ſerving in his majeſty's forces by land, from his duty and allegiance to his ſaid majeſty; againſt the form of the ſtatute," &c. The ſecond count was, for that the defendant "feloniouſly did maliciouſly and adviſedly endeavour to incite and ſtir up the ſaid M. L., he the ſaid M. L. then and there being a perſon ſerving, &c. to commit an act of mutiny, and to commit traiterous and mutinous practices, againſt the form of the ſtatute," &c. After conviction a queſtion was reſerved for the opinion of the judges, Whether the indictment were good in this general form? or, Whether it ought not to have ſtated how and by what acts the priſoner endeavoured to ſeduce the ſoldier? The caſe involving ſome difficulty, it was afterwards argued in the exchequer chamber before all the judges (except Buller, J. who was indiſpoſed), and all thoſe who were aſſembled held the indictment to be ſufficient. This opinion was grounded upon conſideration of many precedents in Tremain

Fuller's caſe, O. B. July, 1797, cor. Bulleri, J. MS. Jud.

Vide the ſame caſe at large in the chapter on Form of Indictments.

Tremain of the like general import, and on the nature of the offence itſelf, created by the act of parliament in the terms laid in the indictment. Ch. II. § 33. *Trial in any County.*

XII. *Deſertion from the King's Forces.* § 34.

Deſertion.

The laſt offence more immediately againſt the allegiance due to the crown, though not amounting to high treaſon, is deſertion from the king's armies. This, whether by land or ſea, in England or abroad, is by ſeveral ancient ſtatutes, and particularly by the ſtats. 18 H. 6. c. 19. 7 H. 7. c. 1. 3 H. 8. c. 5. and 5 Eliz. c. 5. made felony, and, under certain circumſtances, without benefit of clergy; and the ſtat. 2 & 3 Ed. 6. c. 2. renewed by ſtat. 4 & 5 W. & M. c. 23. takes away clergy generally from deſerters in time of war. And the offence is made triable by the juſtices of every ſhire. Theſe ſtatutes are alſo levelled againſt ſome other inferior military offences, which are puniſhable as miſdemeanors; but they are altogether fallen into diſuſe, as well on account of the manner of retaining ſoldiers therein referred to being no longer adopted, as becauſe, ſince the annual acts for puniſhing mutiny and deſertion, a more compendious and convenient ſyſtem of military coercion has obtained.

3 Inſt. 86. 4 Blac. Com. 102. 1 Hale, 674, &c. 1 Hawk. ch. 48. ſ. 8, 9. 18 H. 6. c. 19. 2 & 3 Ed. 6. c. 2. 5 Eliz. c. 5. 7 H. 7. c. 1. 3 H. 8. c. 5.

By the ſtat. 1 Geo. 1. c. 47. If any perſon (other than inliſted ſoldiers, who are already puniſhable by law for ſuch offence) ſhall, in Great Britain, Ireland, Guernſey, or Jerſey, perſuade or procure any ſoldier to deſert, he ſhall forfeit 40 l., to be recovered by any informer; and, if he has not property to that amount, or from the heinous circumſtances of the crime it ſhall be thought proper, the court before whom he is convicted ſhall impriſon him not exceeding ſix months, and alſo adjudge him to ſtand in the pillory for one hour in ſome market town next adjoining to the place where the offence was committed, in open market there, or in the market town itſelf where the offence was committed. By ſ. 2. the proſecution muſt be commenced within ſix months after the offence.

1 Geo. 1. c. 47.

Of Accomplices, and when they may be put on their Trial. § 35.

I. It is generally ſaid, that in high treaſon, whether at common law or by ſtatute, there are no acceſſaries, but all are principals; and that whatever will make a man acceſſary before

All Principals. 1 MS. Sum. 100. 1 Hawk. ch. 17. ſ. 39. ch 20. 2 Hawk ch. 29. ſ. 3. 14.

Foſt. 341, 346. 1 Hale, 214. 239. 323. 328. 613. 3 Inſt. 16. 138. Staunf. 40. Kel. 33.

Ch. II. § 35. *Accomplices, Receivers.*

before or after in felony, will make him a principal in treaſon, and that nothing leſs will. And this is true, both with reſpect to new as well as old treaſons, if it be taken with reſpect to the offence itſelf, or the offender after conviction; but with two exceptions:

1ſt Exception as to certain Receivers.

1ſt, With reſpect to receivers of ſuch as counterfeit the ſeals or money; concerning whom there is a difference of opinion, whether they are guilty of more than miſpriſion of treaſon. Though in all other treaſons againſt the king within the ſtat. 25 Ed. 3. the offence of receiving a traitor knowingly makes the receiver alſo a traitor. I do not find the grounds of this diſtinction any where plainly ſtated. But what ſeems to have led to it is the opinion hinted at by Lord Coke, as entertained by ſome, that the offences of counterfeiting the ſeals and the coin were only felonies at common law; or if, according to the better opinion, they were treaſons, yet they were admitted to clergy, which Lord Hale ſays was formerly allowed in ſome caſes of treaſon; and certainly it was allowed in theſe. The laſt-mentioned author in another place, ſpeaking of counterfeiting the ſeals, ſays that at common law the offence was treaſon or felony, according to the king's pleaſure to indict for either. But even if the indictment were laid proditorie, it was treaſon of an inferior kind, a kind of petty treaſon, as he ſays, in compariſon to thoſe of compaſſing the king's death, levying war, or adhering to his enemies; which opinion is adopted by Mr. Juſtice Blackſtone. That there was a manifeſt diſtinction between them appears from the difference of the judgment at common law between the treaſons for counterfeiting the coin and ſeals, and thoſe of a ſuperior kind. It ſeems doubtful whether the ſtat. 25 Ed. 3. was not in one reſpect introductive of a new treaſon, which was not ſuch at common law, namely, as to the bringing of foreign money into the realm; but this is conſidered as ſubject only to the ſame judgment as other treaſons relating to the coin: and, at leaſt, in other reſpects, it muſt be conſidered that the ſtatute was not intended to enhance the crime or puniſhment of treaſon; for the judgment in the caſe of the coin remains as it did before at common law. If then the offences of counterfeiting the coin and ſeals, admitting them to be treaſons at common law, were clergyable; and that ſtatute was in general

Vide 1 Hale, 237. Sum. 20. 127. 1 Hawk. ch. 17. ſ. 55. 12 Co. 81, 2. Conier's caſe, Dy. 296. a.

3 Inſt. 16.

1 Hale, 181. 223, 4. And *vide* Barrington on the Statutes, 273. 1 Hale, 185. & 223. n.

4 Blac. Com. 89.

1 Hale, 223. 551.

Vide 1 Hale, 220. 227.

1 Hale, 224.

Ibid. 220, 1.

general a reſtraining ſtatute, and not deemed to enhance the crime of treaſon beyond the letter of it; and as receivers cannot be indicted for the act of counterfeiting, &c. within the words of that ſtatute, by force of which they would be ouſted of clergy, as all other kind of aiders to treaſon may, but muſt be indicted ſpecifically for the receipt; ſo it may be argued that by force of that, which was a reſtraining ſtatute, receivers, who do not come expreſsly within the words or neceſſary implication of it, ſhall not thereby be ſubjected to greater penalties than they were liable to before the paſſing of it. And, as there is no ſuch thing at this day as clergyable treaſon, therefore, as Lord Hale ſays, though the more probable opinion may be that ſuch receivers are traitors (and ſo he ſtates them to be in one part of the Summary), yet the more merciful opinion is againſt ſuch a conſtruction. According to the latter opinion, the caſe of John Conier, who was convicted upon an indictment for traiterouſly receiving and comforting J. F., knowing him to have traiterouſly counterfeited the coin, &c. was conſidered to be only miſpriſion of treaſon; and he was at length pardoned. It is evident, however, from the ſtatement of the reporter, that the caſe did not paſs without doubt. And it muſt be admitted, that the beſt modern authorities have adopted the ſtricter conſtruction of the two; conſidering it as a neceſſary one reſulting from the general rule of law, that whatever will make a man acceſſary before or after in felony will make him a principal in treaſon; and that the ſt. 25 Ed. 3. having declared theſe offences to be high treaſon, the conſequence follows of courſe. It ſeems alſo to be greatly ſtrengthened by this conſideration, that otherwiſe the receipt of a common felon would be a higher offence than the receipt of a traitor of this kind, which appears to be incongruous. I have contented myſelf with ſtating how this queſtion ſtands, and ſhall forbear to advance any direct opinion of my own.

Ch II. § 35. *Accomplices, Receivers.*

1 Hale, 238. Poſt.

Ibid. 237.

Vi. infra. Conier's caſe, Dy. 296. a.

3 MS. Sum 189. Burnet's MS. 20, 1. Sum. 127. *Sed vide* ib. 20. *contra.*

Vide 2 Hawk. ch. 29. ſ. 3.

As to what ſhall make a man a receiver or maintainer in treaſon, this follows the general rule in caſes of felony, to which I refer. Thus much, however, may be obſerved in reſpect of counterfeiters of the coin, that the bare uttering of falſe money, knowing it to be ſo, is not ſuch a maintaining of the counterfeiter as will amount to treaſon, but merely a miſpriſion: yet, if this were done with knowledge of the coiner, or in concert with him, it

Oliver's caſe, Kel. 33. Foſt. 342. 1 MS. Sum. 96. 1 Hale, 214. 1 Hawk. ch. 17. ſ. 56.

Ch. II. § 35. *Accomplices, Receivers.*

was ruled in Oliver's caſe to amount to treaſon. If it were done in conſequence of an agreement with the counterfeiter before the counterfeiting, it makes the utterer an aider and abettor; if done after, he is a receiver and maintainer.

16 Geo. 2. c. 31. *Vide* ch. Offences againſt lawful Cuſtody.

The ſtat. 16 Geo. 2. c. 31. has further provided, that the mere aiding or aſſiſting any priſoner, convicted, attainted, or committed for high treaſon, to make his eſcape, though no eſcape be actually made, ſhall be liable to tranſportation for ſeven years.

§ 36. Ante, p. 94. 2d *Exception on Wording of new Laws.* Foſt. 341. 1 Hale, 235, 6. 323. 328. 376.

2. The ſecond exception to the general rule, *that all are principals in treaſon*, is where the ſpecial penning of any act, creating a new treaſon, leads to a different conſtruction; whereon it is to be obſerved that the conſtruction has in general been very favourable in excluding mere receivers or comforters after the fact, not named in ſuch act, from the penalties of high treaſon, if others who may be conſidered as acceſſaries before or at the fact are expreſsly named. This is founded upon the principle that expreſſum facit ceſſare tacitum. And it has been applied to ſtatutes where even the word *aiders* was uſed, when joined with ſuch words only as imported a conſent to the offence. But even in the caſe of new-created treaſon, he who reſcues the traitor from priſon, or ſuffers him voluntarily to eſcape from his lawful cuſtody, though not expreſsly named in the ſtatute, is yet a traitor by a neceſſary conſtruction of law upon the act itſelf; in the ſame manner as offenders of the like ſort were puniſhable at common law as traitors, and ſtill continue ſo though not named in the ſtat. 25 Ed. 3.

II. Next, *as to the evidence affecting accomplices.*

§ 37. *Evidence of acting in concert.*

As it happens more frequently in trials for this than for any other offence, that the acts of ſome of the conſpirators, in the abſence of the others, are given in evidence againſt them, it may be worth a more particular enquiry in what manner the rule is applied.

In this, as in other caſes founded in conſpiracy, the conſpiracy or agreement among ſeveral to act in concert together for a particular end muſt be eſtabliſhed by proof, before any evidence can be given of the acts of any perſon not in the preſence of the priſoner. And this muſt, generally

rally ſpeaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by expreſs evidence of the fact of a previous conſpiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may alſo be done by evidence of the acts of the priſoner, and of any other with whom he is attempted to be ſo connected, concurring together at the ſame time and to the ſame purpoſe or particular object. And here the evidence of a conſpiracy is more or leſs ſtrong, according to the publicity or privacy of the object of ſuch concurrence, and the greater or leſs degree of ſimilarity in the means employed to effect it. The more ſecret the one, and the greater the coincidence in the other, the ſtronger is the evidence of a conſpiracy. Where it appeared that there was a conſpiracy to levy war in the North-Riding of Yorkſhire, and that there was at the ſame time a ſimilar conſpiracy in the Weſt-Riding, in which latter only it took place; and it did not appear that thoſe in the North-Riding agreed to the inſurrection in the Weſt, or that they knew any thing of it: it was agreed that the former could not be implicated in the acts of the latter. And yet the acts of both concurred at the ſame time to the ſame general object; namely, an inſurrection againſt the government. In the caſe of the Earl of Southampton, in that of Purchaſe, and ſome others which have occurred, there was an actual preſence and particular co-operation and aiding in the very acts of rebellion; and therefore they fell under a different conſideration.

Ch. II. § 37. *Accomplices. Evidence.*

Kel 19. 15 Car. 2.

Vide ante, p. 59. Foſt. 216.

§ 38. *Acts of one Conſpirator Evidence againſt all.*

But when the connection between the parties, by one or other of the means above mentioned, is once eſtabliſhed; of which the court muſt in the firſt inſtance judge, previous to the admiſſion of any conſequential evidence to affect the priſoner by the acts of others, to which he was not a party or privy; then whatever is done in purſuance of that conſpiracy by one of the conſpirators, though unknown perhaps to the reſt at the time, is to be conſidered as the act of all. This muſt, however, be underſtood with thoſe diſtinctions which obtain between principal and acceſſary in felony, in reſpect to the extent of their liability for each other's acts; ſo far as thoſe diſtinctions are applicable to treaſon and miſdemeanor, where all who take part are principals. If ſeveral

Kel. 19. 3 Inſt. 9.

Ch. II. § 38. *Accomplices. Evidence.*

perſons agree to levy war, ſome in one place, and ſome in another, and one party do actually appear in arms, this is a levying of war by all, as well thoſe who were not in arms as thoſe who were, if it were done in purſuance of the original concert: for thoſe who made the attempt were emboldened by the confidence inſpired by the general concert, and therefore their particular acts are in juſtice imputable to all the reſt. But ſuppoſe a conſpiracy to levy war and a plan of operations ſettled, and thoſe to whom the execution of them is committed afterwards ſee occaſion to vary in certain particulars from the original plan, which is accordingly done unknown to ſome of the conſpirators: yet I conceive that if the new meaſures were conducive to the ſame end, and that in ſubſtance the original conſpiracy were purſued, they all remain reſponſible for each other's acts.

Rex v. Horne Tooke, O. B. Nov. 1794. MS.

Upon the trial of John Horne Tooke for high treaſon, much of the ſort of evidence to which I have alluded was given. The indictment was for compaſſing the king's death; and the overt acts charged were in ſubſtance, that the priſoner with ſeveral others named conſpired to procure a convention to be called to uſurp the powers of government, depoſe the king, and ſubvert the conſtitution. In ſupport of which the counſel for the crown read the minutes, (being firſt verified to be true minutes of their proceedings,) of two ſocieties or voluntary aſſociations of perſons calling themſelves the ſociety for conſtitutional information, and the London correſponding ſociety, of the former of which the priſoner was a member: and alſo various letters addreſſed from ſimilar ſocieties in different parts of the country to the ſecretaries of theſe ſocieties, found in their poſſeſſion or in that of the members of the other ſocieties who correſponded with them. To the reception of this body of evidence there was ſome oppoſition by the counſel for the priſoner. But the court ruled that all theſe papers, and the acts of perſons engaged in the ſame deſign, were proper to be received as evidence of the general conſpiracy. Alſo the minutes of the proceedings of a number of other perſons who met at Edinburgh, and called themſelves a Britiſh convention for the reform of parliament, to which the ſociety for conſtitutional information had ſent a delegate, whoſe conduct they approved of, were read; thoſe minutes having been found on one Skirving who acted as ſecretary to that convention. Evidence was alſo given

given of a book called the ſecond part of the Rights of Man, by Thomas Paine, which the ſociety for conſtitutional information had made the ſubject of their thanks to the author, and of which they had promoted the diſtribution. The book was proved by one Jordan a bookſeller, who looking at it ſaid that he had publiſhed a book like it, and of the ſame type. This mode of proof was objected to; but the court overruled the objection, there being nothing of ſtrict identity in the inquiry. Evidence of the like ſort was given upon the other trials which took place about the ſame period.

Ch. II. § 38. *Accomplices. Evidence.*

Rex v. Hardy and Thelwal, O. B. Oct. Nov. and Dec. 1794. MS.

In William Stone's caſe before mentioned, evidence having been given to connect the priſoner with John H. Stone and Jackſon, and to ſhew that they were engaged in a conſpiracy to tranſmit to the French enemy an account of the diſpoſition of the people of England in caſe of an invaſion; the ſecretary of ſtate was called to prove that a letter of Jackſon's, containing treaſonable information of the ſtate of this country, had been tranſmitted to him from abroad, but in a confidential way, which made it improper for him to ſay by whom it was communicated. This evidence was objected to on the part of the priſoner, as the letter was not proved to have come to his hands, and he ought not to be affected by any but his own acts. But the court admitted the evidence; and Lawrence, J. obſerved, that in Tooke's caſe (above referred to) he had alluded to the caſes of Lord Stafford and Lord Lovatt, to ſhew that in order to prove a conſpiracy the acts of the different conſpirators were admiſſible, though acts to which the priſoner was no party: and that in this caſe evidence having been given from the acts of the priſoner himſelf, ſufficient for the jury to conſider whether he were not one of a treaſonable conſpiracy with Jackſon; if they ſhould be of that opinion, Jackſon's acts done in purſuance of that conſpiracy were in contemplation of law the acts of the priſoner. And Lord Kenyon, who had on the firſt day of the trial when the evidence was received relied altogether on the authority of the precedents in Hardy's caſe and Horne Tooke's caſe, on the next day declared himſelf perfectly ſatisfied on principle with the deciſion of the court: of which alſo the priſoner's counſel then ſignified their approbation. A paper was alſo read on the ſame trial found in the poſſeſſion of Jackſon, in the hand-writing of one Galliers a clerk

Rex v. W. Stone, at the Bar of the Court of B. R. Hil. 36 Geo. 3. MS. and 6 Term Rep. 527. Ante, p. 79. *Vide* poſt. S. C.

Ch II. § 38. *Accomplices. Evidence.*

of the defendant, the reading of which was at firſt oppoſed; but afterwards the paper was agreed by the defendant's counſel to be evidence, when they found it contained parts of ſome other papers which the defendant had before obtained from other perſons. Another paper ſo found, which was alſo in the hand-writing of Galliers, was not allowed to be read, merely on that account, as evidence of its having been ſent to Jackſon by the priſoner, which was the ground on which it was offered by the counſel for the crown; becauſe it was properly obſerved it did not follow becauſe the defendant had employed Galliers to write one paper, therefore he had employed him to write this. What were the contents or nature of the paper did not appear, and there was no reſolution of the court on that ground. But if the paper had appeared to have related to the conſpiracy in queſtion, it muſt I conceive in that ſtage of the trial have undergone a different conſideration.

§ 39. *How far the general rule applicable with reſpect to trial.* 1 MS. Sum. 100, 1, 4. Foſt 342, 346. 1 Hale, 613.

But further, with reſpect to the trial, the general rule, *that all are principals in treaſon*, muſt be underſtood with more limitation. In regard to all acts of approbation, incitement, advice, or procuring towards that ſpecies of treaſon, which in judgment of law falls within the clauſe of compaſſing the king's death, or that of the queen or prince, there is no doubt but that the party may be tried before the perſon who acted upon ſuch incitement; becauſe the bare adviſing or encouraging to ſuch actions is in itſelf a complete overt act of compaſſing; and it is totally immaterial whether the attempt were ever made or not. The caſe of Somerville proves no more than this; though the rule is there laid down in general terms, that a perſon aiding or procuring a treaſon may be tried before the actor. But with regard to all other treaſons within the ſtat. 25 Ed. 3. if one adviſe or encourage another to commit them, or furniſh him means for that purpoſe, in conſequence whereof the fact is committed, the adviſer will indeed be a principal; for ſuch advice or aſſiſtance would have made him an acceſſary before the fact in felony: but if the other forbore to commit the act thus adviſed, the adviſer could not be a traitor merely on account of his ineffectual advice and encouragement; though his conduct would be highly criminal: for it cannot be ſaid that a perſon procured an offence which in truth was never committed.

(Somerville's caſe, 1 And. 109.) *Vide* 1 Hale, 223.

In

In theſe caſes therefore the treaſon is of a derivative nature, and depends entirely upon the queſtion, Whether the agent have or have not been guilty of ſuch treaſon? the proof of which can only be legally eſtabliſhed by his conviction, if he continue ameſnable to juſtice, or his attainder by outlawry, if he abſcond; unleſs the acceſſary chooſe to waive the benefit of the law, and ſubmit to a trial. Ch. II. § 39. *Accomplices. Trial.* [1 Hale, 623. 2 Hale, 224.]

The ſame rule holds in caſe of aſſiſtance or protection to a traitor after the fact in all caſes, or of permitting or procuring his eſcape from cuſtody. The party knowingly affording ſuch protection or contributing to ſuch eſcape, if the treaſon have been in fact committed, will be a principal traitor; but the fact of the principal's guilt muſt firſt be eſtabliſhed, and notice of it muſt alſo appear to have been received by him who may be called the acceſſary after. For it cannot be ſaid that a perſon received or ſuccoured a traitor knowingly, that is, with a knowledge of the treaſon's having been committed, when in truth either no ſuch treaſon was committed by him, or the receiver was altogether ignorant of it. But it would be ſufficient if a reſcuer knew that the party was committed for high treaſon, if in fact he were guilty of it: and though he were not guilty of it, yet it would be a great miſdemeanor to reſcue one under ſuch a charge, or ſuffer him to eſcape. And though the party himſelf, committed for treaſon and breaking his priſon, may be tried for that offence before he is convicted of the treaſon, yet it can only be for felony, upon the ſtatute de frangentibus priſonam. So if both be indicted together, the jury muſt be firſt charged to inquire of the guilt of the principal. 1 MS. Sum. 101, 102. Foſt. 342—346. 1 Hale, 235, 7, 8. 598. 2 Inſt. 590. Bro. Treaſon, 11. *Vide* Offences againſt lawful cuſtody, poſt. 1 Ed. 2. ſt. 2. 1 Hale, 238. 2 Hale, 223.

By a temporary act of the 14 Eliz. c. 2. the conſpiring, imagining, or going about unlawfully and maliciouſly to ſet at liberty any perſon committed for high treaſon or ſuſpicion thereof before indictment, and ſetting forth the ſame, or declaring it by expreſs words, writing, or other matter, was made miſpriſion of treaſon; but after indictment of the principal it was made felony ſo to conſpire, and declare ſuch conſpiracy; and after his conviction or attainder, it was made high treaſon ſo to do. On this Lord Hale obſerves, that under the ſtat. 25 Ed. 3. if there were only a commitment of the principal for treaſon, but no treaſon in fact committed by him, the ſetting him at liberty was no treaſon. And that the mere conſpiring to do ſo, though manifeſted by open 1 Hale, 326.

Ch. II. § 29. *Accomplices. Trial.*

act, neither was nor is treaſon, though the party impriſoned were indicted or even attainted, but only a bare miſdemeanor puniſhable by fine and impriſonment; that is, provided the conſpiracy were not effected.

It is not equally clear how the rule, with reſpect to the courſe of trial, would be in the caſe of a *conſtructive* levying of war, namely, in regard to ſuch perſons as accidentally join others in the commiſſion of unlawful and traiterous acts, but without any knowledge of their previous traiterous deſign, which previous deſign alone conſtitutes ſuch acts to be high treaſon. That ſuch an aiding and ſupporting in the very act of rebellion does make the parties guilty of high treaſon, notwithſtanding their ignorance of the treaſonable intent, is clear. This was expreſsly determined in the caſe of Purchaſe before mentioned. The three diſſenting judges in that caſe grounded their opinion on the conſideration that it was not directly found that he aided and aſſiſted the ſaid traitors, though they agreed that the mob were continuing their act of treaſon when he joined them. The ſame doctrine was holden in the caſe of the Earl of Southampton, and thoſe who lent their aſſiſtance to Eſſex's rebellion; and alſo by a majority of the judges in the caſes of Appletree and Latimer, in the 20 Car. 2. But in each of theſe caſes thoſe who were actually privy to the deſign, and took a principal part in the very acts of treaſon, were indicted and convicted at the ſame time. Yet it muſt be conſidered that in this as in all other caſes grounded in conſpiracy, where ſeveral perſons take the ſame or different parts all tending to the ſame end, that of itſelf is primâ facie evidence that they all acted with the ſame deſign.

Purchaſe's caſe, ante, p. 74. and 8 St. Tr. 285. Trevor, C. J. Powell, J. and Price, B. MS. Tracy, 17.

Ante, p. 59.

20 Car. 2. Kel. 70. 78.

I ſhall next conſider where the trial is to be had, and the manner in which it is regulated.

Of the Trial.

§ 40. *Trial in what Place.*

The ſtat. 1 & 2 Ph. & Mary, c. 10. enacts, "that all trials hereafter to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common laws of this realm, and not otherwiſe." This offence is triable therefore, like all others, in the county where the offence is committed, that is, where the overt acts charged

1 & 2 Ph. & M. c. 10. ſ. 7. Dy. 132. a. 1 And. 195.

charged in the indictment were done; but as I ſhall hereafter ſhew, it is enough if one overt act be proved in that county. The above act of Philip and Mary is a virtual repeal of the ſtatutes of the 26 and the 32 Hen. 8. c. 4. as to the trials of treaſons committed in Wales; for though the indictment is not properly the trial, yet it is ſo connected therewith that they cannot be ſeparated in this reſpect without ſpecial proviſion for that purpoſe; and it is alſo a repeal of the ſtat. 33 Hen. 8. c. 23. as to treaſons in general.

Ch. II. § 40. *Trial. Place.*

Poſt, f. 61. 1 Hale, 157. 282. *Wales.* Foſt. 238.

Treaſons committed on the high ſeas are triable before the admiral, by commiſſion under the great ſeal, by virtue of the ſtat. 28 Hen. 8. c. 15. which in this reſpect ſtands unrepealed by the ſtat. 1 Mar. ſtat. 1. c. 1.

Treaſons on High Seas. 28 H. 8. c. 15. *Vide* tit. Piracy. 1 Hale, 282.

As to other treaſons committed out of the realm, proviſion is made by the ſtat. 35 Hen. 8. c. 2. which enacts, "that all manner of offences being then already made or declared, or after to be made or declared by any law of this realm to be treaſons, miſpriſions of treaſons, or concealment of treaſons, and committed by any perſon out of this realm of England, ſhall be from thenceforth inquired of, heard, and determined before B. R. by jurors of the ſame ſhire where the ſaid bench ſhall ſit, or elſe before ſuch commiſſioners and in ſuch ſhire of the realm as ſhall be aſſigned by the king's commiſſion (*a*), and by lawful men of the ſame ſhire; in like manner and form to all intents and purpoſes as if ſuch treaſons, &c. had been committed within the ſame ſhire where they ſhall be ſo inquired of," &c. By ſ. 2. the privilege of peerage is ſaved.

Foreign Treaſons. 35 H. 8. c. 2. *Vide* 1 Hale, 284. The ſtat. 5 & 6 Ed. 6. c. 11. ſ. 6. is to the ſame effect. *Vide* 1 Hale, 294, 5, 6.

(*a*) Which commiſſion may be ſigned by the king's ſign manual, or iſſued by the chancellor by virtue of a warrant ſo ſigned. 1 Hale, 284.

A like proviſion is made with reſpect to Scotchmen by the ſtat. 7 Ann. c. 21. ſ. 5., who are triable before commiſſioners in any ſhire, ſtewarty, or county of Great Britain, as ſhall be aſſigned by the crown for all treaſons and miſpriſions of treaſons committed out of the realm of Great Britain.

7 Ann. c. 21. ſ. 5.

Neither the ſtat. 35 H. 8. c. 2. nor the 28 H. 8. c. 15., concerning the trial of treaſons on the high ſeas, are repealed by the ſtat. 1 & 2 Ph. & Mary, c. 10.; for that was only meant to reſtore the common law trial of treaſons within the realm, in which great innovations had been made in the reigns of *Henry* 8. and *Edward* 6. But there was no way regularly appointed at common law for the trial of

2 Hawk. ch. 25. ſ. 53. 1 Hale, 284. 316. Foſt. 238. Vaughan's caſe, 5 St. Tr. 38. 1 MS. Sum. 25. 3 Inſt. 24. poſt, p. 195.

Ch. II. § 40. *Trial. Place.*

treaſons committed out of the realm, as may be collected from the preamble to the ſtat. 35 H. 8. c. 2. Yet, if the court remove into a different county from that wherein the indictment was found, the trial muſt ſtill be by jurors returned from the firſt county, agreeable to the rules of the common law.

a Hawk. ch. 25. ſ. 50.
1 Hale, 284.
1 And. 105.

Vide tit. Piracy.

One ſpecies of treaſon, namely, that of committing hoſtilities at ſea, under colour of a foreign commiſſion, or any other ſpecies of adherence to the king's enemies there, may be indicted and tried as piracy by virtue of the ſtats. 28 H. 8. c. 15. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30.

§ 41. *Foreign Dependencies.*

There are inſtances in the books of trials in England for high treaſon, committed by Iriſhmen in Ireland before the union; one of them in the caſe of an Iriſh peer, who objected without avail to the defect of trial by his peers. This has not paſſed without queſtion: but, ſince the legiſlative incorporation of the two countries, theſe caſes cannot be brought into precedent again. And very ſhortly before the union an act paſſed directly repugnant in ſpirit to thoſe authorities. This was the temporary act of the 39 Geo. 3. c. 44. ſ. 7, 8., by which it was provided, "that perſons ſent from Ireland to this country for ſafe cuſtody, charged with treaſon, ſuſpicion of treaſon, or treaſonable practices there, and perſons taken up in this country, on a charge of the ſame offences committed in Ireland, may be detained here in ſuch places as his majeſty may think fit; but that ſuch perſons, when entitled by the law of Ireland (if they had been in cuſtody there) to be tried or diſcharged, may apply to the court of B. R. or any judge thereof, who ſhall order them to be diſcharged, or ſent to Ireland to be dealt with according to law."

O'Rourke's caſe, 1 Hale, 155. 284.
Sir John Perrott's caſe, 1 St. Tr. 189.
Lord M'Guire's caſe, 3 St. Tr. 949.
Dy. 360. b. contra.
Vide 2 Hawk. ch. 25. ſ. 52.

It ſeems to me that the true queſtion in ſuch caſes is, whether by force of the relation between a foreign dependency and the parent ſtate, the legiſlative acts of the latter be or be not binding proprio vigore upon the inhabitants of the former. But with reſpect to all thoſe colonies and dependencies of the crown of England, which remain under its legiſlative control, all treaſons committed therein are undoubtedly triable here by force of the ſtat. 35 H. 8. c. 2. although they may have ſome ſpecial laws of their own applicable to criminals, and juriſdiction for their trials. This ſeems to ariſe

1 Hale, 156. 8. Colepepper's caſe, 1 ſ. entr. 349.
Vide 4 Mod. 225.
1 MS. Sum. 27.
2 MS. Sum. 445.
Vide Platt's caſe, O. B. 1777. Leach, 141.

ariſe of neceſſity from the very nature of the tie of allegiance by which they are knit to the crown of England, unleſs there be any expreſs convention or ſtipulation that the ſubjects thereof ſhall only be judged by their own particular laws and tribunals. In Platt's caſe above referred to, it was ſaid by the court, that the ancient opinion was, that adherence to the king's enemies within the meaning of the ſtat. 25 Ed. 3. c. 2. might even before the ſtat. 35 H. 8. have been tried by the rules of the common law within the kingdom, though the aid and comfort were afforded out of it; but that every other ſpecies of treaſon committed without the realm could only be tried here under the proviſions of that act. Ch. II. § 41. *Trial. Place.*

The ſtat. 35 H. 8. however, does not include Wales, which is within the realm of England; nor Scotland, which is incorporated therewith by the act of union. During the rebellion, which began in Scotland in the year 1745, an act paſſed empowering the king to iſſue commiſſions for trying the rebels in any county of the kingdom, in the ſame manner as if the treaſons had been committed in that county. Alexander and Charles Kinloch, two of the rebels, who were Scotchmen born, and indicted for overt acts of high treaſon committed in Scotland, inſiſted upon the benefit of the act of union in a plea to the juriſdiction of the ſpecial commiſſioners in Surry; which was over-ruled upon the authority of the ſtatute under which the court ſat. Upon that occaſion Mr. Juſtice Foſter was of opinion, that the objection, if any, was available upon the plea of not guilty; for, unleſs the caſe of the priſoners was brought within the act, they would have been entitled to an acquittal for want of proving an overt act in the county where the commiſſion ſat, and from whence the jury came: or, as the merits of the objection appeared on the face of the indictment, which ſet forth the act of parliament, and laid the overt acts in Scotland according to the fact, it was alſo open to them to move in arreſt of judgment on the ſame ground. (c. 2.) (19 G. 2. c. 9.) Foſt. 1. The caſe of the Kinlochs, in 1746. Foſt. 15, 16. 23.

This and other acts of the like kind were neceſſary, becauſe Scotland being by the act of union within the realm, the Scotch rebels could not have been tried in England for acts of rebellion committed in a ſhire of Scotland without a ſpecial authority for that purpoſe. Burnet's MS. Sum. 15. *Vide* Calvin's caſe, 7 Co. 3. 15.

As

Ch. II. § 42.

As to the Mode in which Trials for this Offence ſhall be regulated.

§ 42. *Mode of Trial.*

Regulations of Trial by ſtat. 7 W. 3. c. 3.

The legiſlature, for the ſafeguard of the ſubject under the weight of a ſtate proſecution, and the popular odium of ſo deteſtable a charge, have deemed it neceſſary to make ſpecial proviſion by ſeveral acts of parliament, particularly by the ſtat. 7 W. 3. c. 3. Theſe may be conſidered under the following heads of inquiry:

1. *To what Treaſons theſe Regulations extend.*
2. *Before what Tribunals.*
3. *Within what Time Proſecutions muſt be commenced.*
4. *When and what Objections may be taken to Want of Form in the Indictment.*
5. *By what Witneſſes and Evidence the Indictment muſt be ſupported.*
6. *To what Privileges the Defendant is entitled in preparing for and making his Defence.*

§ 43. *To what Treaſons extending.* 7 W. 3. c. 3. Foſt. 222. 224, 6, 7. 1 MS. Sum. 52. 83, 84. 2 MS. Sum. 477. Poſt. *Vide* ſt. 20 G. 2. c. 30. enabling perſons impeached of high treaſon, &c. *whereby any corruption of blood may be made*, to defend themſelves by counſel.

1. The act of the 7 W. 3. c. 3. for regulating trials in caſes of high treaſon and miſpriſion of treaſon, is confined to high treaſons (except in the particulars after noticed,) whereby any corruption of blood may or ſhall be made to the offender or his heirs, and to the miſpriſions of ſuch treaſons. The 1ſt and 2d ſections are expreſsly limited to ſuch treaſons, and all the ſubſequent clauſes, except the 10th and 11th, uſe words of reference. This muſt be intended of all ſuch treaſons, as well thoſe created by ſtatutes ſubſequent as before, where the corruption of blood is not ſaved by the ſtatute. And therefore, if high treaſon be committed on the high ſeas, the defendant in a proſecution under the ſtat. 28 H. 8. c. 15. will be entitled to the benefit of the act, notwithſtanding the doubt (though as Mr. Juſtice Foſter conceives, without juſt ground), whether a corruption of blood be wrought in that proceeding (*a*). But the caſes of

(*a*) It is probable that Mr. Juſtice Foſter had in view a caſe at an Admiralty Seſſions in July 1705, where Powell, J. ſaid, and which was agreed by the civilians, that it had been ruled by all the judges that the ſtat. 7 W. 3. extends to treaſons on the ſea, though they do not make a corruption of blood, and the purview of the ſtatute confines it to treaſons whereby any corruption of blood ſhall be made: for, ſaid Powell, J. thoſe words were expounded to relate to the treaſons of counterfeiting the coin, &c. which are there excepted. MS. Tracy, 254 & 258. *Vide* Vaughan's caſe, 5 St. Tr. 37.

petty

petty treaſon, of treaſons created by acts ſaving the corruption of blood, and of the treaſons expreſsly excluded by the 13th ſection of the act, of counterfeiting the king's coin (*a*), the great ſeal, privy ſeal, ſign manual, and privy ſignet, all ſtand upon the ſame foot as they did before the making of this act. By the ſtat. 6 *Geo.* 3. *c.* 53. the ſame caſes are excepted out of the ſtat. 7 *Ann. c.* 21. *ſ.* 11. after mentioned, which is auxiliary to that of W. 3.; and the ſame ſtatute of Geo. 3. alſo provides, that nothing in the ſaid ſtatute of Ann. ſhall extend to any indictment for high treaſon, or to any proceedings thereupon againſt any offender, who by any act or acts now in force is to be indicted, arraigned, tried, and convicted by ſuch like evidence, and in ſuch manner as is uſed and allowed againſt offenders for counterfeiting the king's coin.

Ch. II. § 43. *Trial. Regulations.*

Foſt. 227.

Vide poſt, c. 48.

The operation of the ſtatute of King William has been ſtill further confirmed by a late act, which took its riſe from the attempt of a wretched maniac of the name of Hadfield to aſſaſſinate his majeſty, by firing a piſtol at him as he entered the theatre at Drury-lane. The reaſon of the ſtatute, which is very ſhortly hinted at in the preamble, is obvious: it was thought incongruous that greater privileges and indulgence ſhould be allowed to a priſoner upon his trial under a charge for aſſaſſinating or attempting the life of his ſovereign, than if he had made the ſame attempt upon the life of any of his majeſty's ſubjects. Upon this occaſion the priſoner had the benefit of the ſtat. of King *William*, and ſoon after the legiſlature paſſed the following law:

By ſtat. 40 Geo. 3. c. 93. reciting "that it is expedient that in caſes of high treaſon in compaſſing or imagining the death of the king, and of miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon alleged in the indictment

40 *G.* 3. *c.* 93. *Exception in caſes of attempts on the king's perſon.*

(*a*) A doubt has been thrown out, Whether other treaſons relating to coin, not the king's coin, are within this exception; namely, the importing coin counterfeited to the ſimilitude of Engliſh coin, and the counterfeiting foreign coin made current here by proclamation; in both of which a corruption of blood is worked? Undoubtedly theſe ſtand *in pari ratione* with the exception as to the counterfeiting of the king's coin ſtrictly ſo called; and to avoid a palpable incongruity, which cannot be imputed to the legiſlature, ought to receive the ſame conſtruction. Beſides, in the latter caſe any coin which is current here by the king's authority may juſtly be deemed the king's coin, unleſs the apparent ſenſe of a ſtatute lead to a different conſtruction; the contrary of which is the caſe here.

Vide Foſt. 226.

ſhall

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ſhall be the aſſaſſination or killing of the king, or any direct attempt againſt his life, or any direct attempt againſt his perſon, whereby his life may be endangered, or his perſon may ſuffer bodily harm, the trial for ſuch offence ſhould not be different from trials for murder or wilful and malicious ſhooting; enacts, that in all caſes of high treaſon in compaſſing or imagining the death of the king, and of miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon which ſhall be alleged in the indictment ſhall be aſſaſſination or killing of the king, or any direct attempt againſt his life, or any direct attempt againſt his perſon, whereby his life may be endangered or his perſon may ſuffer bodily harm, the perſon or perſons charged with ſuch offence ſhall and may be indicted, arraigned, tried, and attainted in the ſame manner, and according to the ſame courſe and order of trial, in every reſpect, and upon the like evidence, as if ſuch perſon or perſons ſtood charged with murder: and none of the proviſions contained in the ſeveral acts of the 7 W. 3. and 7 Ann. reſpectively, touching trials in caſes of treaſon and miſpriſion of treaſon reſpectively, ſhall extend to any indictment for high treaſon in compaſſing and imagining the death of the king, or for miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon alleged in the indictment ſhall be ſuch as aforeſaid: but upon conviction on ſuch indictment, judgment ſhall be nevertheleſs given, and execution done, as in other caſes of high treaſon."

2. *Before what Tribunals.*

§ 44. *Before what Tribunals.* 7 W. 3. c. 3. ſ. 10, 11, 12. Foſt. 246. 1 Inſt. 156. b. Moor, 622. 4 Blac. Com. 262.

The ſtat. of W. 3. is not only applicable to examinations of ſuch treaſons before the ordinary courts of juſtice, but ſpecial proviſion is alſo made therein for a more equal and indifferent trial of peers in the like caſes. Before this time, upon the trial of a peer in the court of the high ſteward, the peers triers were a ſelect number returned at the nomination of the high ſteward. This was the real miſchief, though not that which is ſpecified in the act; and for remedy thereof it is enacted, "That upon the trial of any peer or peereſs for high treaſon or miſpriſion, all the peers who have a right to ſit and vote in parliament ſhall be duly ſummoned, twenty days at leaſt before the trial, to appear at ſuch

ſuch trial; and that every peer ſo ſummoned and appearing ſhall vote in the trial of ſuch peer or peereſs, having firſt taken the oaths appointed by the act." This clauſe refers to trials for treaſons generally, and is not confined to ſuch treaſons only as corrupt the blood. It is followed by a proviſo, that nothing in the act contained ſhall extend "to any impeachment or other proceedings in parliament in any kind whatſoever." But notwithſtanding the generality of theſe latter words it was clearly ſettled in the caſes of the Earls of Kilmarnock and Cromartie, and of the Lord Balmerino, that they do not extend to exclude the trial of peers in full parliament in the ordinary courſe of juſtice; but that they are entitled to all the benefit of the act. And, accordingly, upon the trial of thoſe peers for high treaſon, all the lords were ſummoned, and ſuch as appeared took the oaths appointed by the act.

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Vide Foſt. 222. 247.

ſt. 7 W. 3. c. 3. ſ. 12. not extending to impeachment or other proceedings in parliament.

Vide ſt. 20 G. 2. c. 30. ante, p. 106. Foſt. 247. 1 MS. Sum. 80. Caſes of the Lords Kilmarnock, Cromartie, and Balmerino.

3. *Within what Time Proſecutions muſt be commenced.*

By the ſame act of William no proſecution ſhall be for any of the treaſons or miſpriſions within the act, committed in England, Wales, or Berwick upon Tweed, "unleſs the indictment be found by a grand jury within three years after the offence committed;" "except (by ſ. 6.) where any perſon ſhall be guilty of deſigning, endeavouring, or attempting any aſſaſſination on the body of the king, by poiſon or otherwiſe," in which caſe the proſecution may be at any time.

§ 45. *Limitation of Time.*

7 W. 3. c. 3. ſ. 5. Foſt. 249.

The above limitation is, by the tenor of the ſtat. 7 Ann. c. 21., extended to treaſons of the like kind committed in Scotland. It was ſo underſtood at the time of the rebellion in 1715; and, therefore, after all the proceedings upon the ſpecial commiſſions in England were at an end, another ſpecial commiſſion went into Scotland, merely for the finding bills of indictment in the proper counties and ſtewarties, in order to prevent the limitation taking place.

4. *When and what Objections may be taken to the Form of the Indictment.*

"No indictment for any of the offences aforeſaid, nor any proceſs or return thereupon, ſhall be quaſhed for miſ-writing, miſ-ſpelling, falſe or improper Latin, unleſs the exception be taken in court by the priſoner, or his counſel

§ 46. *Objections to form of Indictment.* 7 W. 3. c. 3. ſ. 9.

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aſſigned, before any evidence be given in open court upon ſuch indictment; and no ſuch miſ-writing, miſ-ſpelling, falſe or improper Latin, after conviction on ſuch indictment, ſhall be cauſe to ſtay or arreſt judgment; but ſuch judgment may, nevertheleſs, be reverſed upon writ of error, as before the making of this act."

2 MS. Sum. 75. Foſt. 231. Rookwood's caſe, 4 St. Tr. 668. 674. Cranburne's caſe, ib. 698.

It has not at any time been uſual to quaſh indictments for high treaſon, though it may be done. And though the act ſtates that exceptions, grounded on thoſe miſtakes, muſt be taken before evidence be given, it does not therefore follow that the defendant may take ſuch exceptions at any time before. The practice remains as it was at common law; and the conſtruction upon this act has been conformable thereto, that they muſt be taken before plea pleaded; and accordingly in the ſeveral caſes of Vaughan, Sullivan, and Layer, the court refuſed to hear ſuch exceptions after plea: though it is ſtill open to the priſoner afterwards to move in arreſt of judgment.

Vaughan's caſe, 5 St. Tr. 17. Sullivan's caſe, O. B. 1715. Layer's caſe, 6 St. Tr. 229. Poſt. f. 50.

2 MS. Sum. 75, 76.

But though ſome words in the indictment are inſignificant or improper, yet if others, which are proper, are alſo uſed, the court will not quaſh the indictment, but will reject the former as ſurpluſage. Thus, in Layer's caſe, where the words were "ad ſeiſiend. capiend. et impriſonand." the words "*ad ſeiſiend.*" were rejected, as the ſubſequent words "*ad impriſonand.*" were ſufficient and proper. And it may be obſerved generally, that where ſeveral words are uſed in ſetting out an overt act of treaſon, one of which is improper; or if ſeveral overt acts are charged, and one of them defectively ſet out; the court will not quaſh the indictment, provided there be proper words ſufficient to ſupport it in the one caſe, or if any of the overt acts be well ſet out in the other: for otherwiſe the crown would be deprived of an opportunity of proving that which is well ſet out; and if any one overt act be well laid and proved, it is ſufficient.

Poſt. f. 60.

Layer's caſe, 6 St. Tr. 237. *Vide* Lovick's caſe, 4 St. Tr. 917.

Poſt.

§ 47. *Witneſſes and Evidence.*

5. With reſpect to the fifth branch of inquiry propoſed, namely,

By what Witneſſes and Evidence the Indictment muſt be ſupported,

Poſt. 5. 53, &c.

I ſhall have an opportunity of conſidering it better in the next diviſion of this chapter.

Ch. II. § 48. *Trial. Regulations.*

6. As to what Privileges the Defendant is entitled in preparing for and making his Defence.

§ 48. *Privileges of Defendant in his Defence.*

By the ſtat. 7 W. c. 3. ſ. 1. "All and every perſon and perſons indicted for high treaſon, whereby any corruption of blood may be made to ſuch offenders or their heirs, or for miſpriſions of ſuch treaſons, ſhall be admitted to make their full defence by counſel; and the court before whom ſuch perſon or perſons ſhall be tried, or ſome judge thereof, is required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons ſuch and ſo many counſel (not exceeding two) as he or they ſhall deſire: to whom ſuch counſel ſhall have free acceſs at all ſeaſonable hours." And by ſtat. 20 Geo. 2. this privilege is extended to impeachments for treaſon corrupting the blood, which had before been excepted generally from the benefit of the act of William.

7 W. 3. c. 3. ſ. 1. *Counſel.* *Vide* Poſt. 228.

20 G. 2. c. 30.

7 W. 3. c. 3. ſ. 1.

Each priſoner is entitled, under the ſtat. of William, to have two counſel aſſigned him, although indicted jointly with others for the ſame treaſon. This was ſo ordered in the caſes of Rookwood and Lovick, who were indicted together for the Aſſaſſination Plot; and on the trials of Hardy and others at the Old Bailey, in 1794.

4 St. Tr. 663. 718.

MS.

The ſame act of William requires, that the perſon or perſons ſo indicted "ſhall have a true copy of the whole indictment (but not the names of the witneſſes) five days at leaſt before trial, to adviſe with counſel thereupon to plead and make their defence, his or their attorney or agent requiring the ſame, and paying the officer his reaſonable fees for writing thereof, not exceeding 5 s. for the copy of every ſuch indictment.

Copy of Indictment. 7 W. 3. c. 3. ſ. 1. *To adviſe with Counſel.* Poſt.

And by ſ. 7. of the ſame act, every ſuch perſon ſhall have a copy of the panel of the jurors who are to try him, duly returned by the ſheriff, and delivered unto him two days at leaſt before he ſhall be tried.

ſ. 7. *Copy of Panel.*

But alteration has been made in ſome of theſe reſpects by the ſtat. 7 Ann. c. 21. which enacts, that after the deceaſe of the pretender, "when any perſon is indicted for high treaſon, or miſpriſion of treaſon, a liſt of the witneſſes who ſhall be produced on the trial for proving the ſaid indictment, and of the jury, mentioning the names, profeſſions, and place of abode of the ſaid witneſſes and jurors, ſhall be alſo

7 Ann. c. 21. ſ. 11.

Liſt of Witneſſes, and Liſt of Jury, with their Profeſſions and Places of abode.

Ch. II. § 48. *Trial. Regulations.*

alſo given at the ſame time that the copy of the indictment is delivered to the party indicted. And that copies of all indictments for the offences aforeſaid, with ſuch liſts, ſhall be delivered to the party indicted *ten* days before the trial, and in the preſence of two or more credible witneſſes."

Dougl. 591.

Theſe additional privileges were exerciſed for the firſt time on Lord George Gordon's trial.

1 Hawk. ch. 39. per tot. Foſt. 228. 231, &c. 1 MS. Sum. 59. 63. Charnock's caſe, 4 St. Tr. 563. Parkyn's caſe, 4 St. Tr. 630, 1.

None of theſe privileges of having counſel aſſigned to make a full defence, or of having a copy of the indictment, or of the panel, or a liſt of the witneſſes, were demandable of common right; though upon the trial of collateral iſſues, whether in caſes of treaſon or felony, as alſo upon a doubtful queſtion at law, counſel have always been aſſigned, upon the prayer of the priſoner, to addreſs the jury in the one caſe, and in the other to argue the point on his behalf. In Ratcliffe's caſe, who, having eſcaped after attainder, and been re-taken, was tried upon a collateral iſſue, whether he was the ſame perſon who had been before attainted; he was denied a copy of the record, but had the aſſiſtance of counſel, who obſerved fully on the evidence to the jury. The ſame courſe was taken in Johnſon's caſe. In the former the venire was awarded and returnable inſtanter.

Ratcliffe's caſe, M. 20 G. 2. B. R. Foſt. 40.

Johnſon's caſe, M. 2 G. 2. B. R. Foſt. 46.

§ 49. *How the Time computed.*

Time for giving Copies.

Caſes of Rookwood, Lowick, and Cranburne, 4 St. Tr. 661. Ld. George Gordon's caſe, Dougl. 591. 2 MS. Sum. 59. MS. Tracy. Greg's caſe, poſt., and in the caſe of May, alias Smith and others, April 1708. MS. Tracy. Foſt. 2. 230. 250.

By neceſſary conſtruction the *ten days* mentioned in the ſtat. 7 Ann. muſt be reckoned after the bill is found, and before the arraignment of the priſoner; for till the finding of the bill there is no indictment, and upon the arraignment the priſoner muſt plead inſtanter. The ten days muſt in the inſtance of the copy of the indictment be reckoned excluſive of the day of delivery, and the day of arraignment; and, with regard to the copy of the panel, excluſive of the days of delivery, and of trial. By general practice too the time, at leaſt with reſpect to the copy of the indictment, has alſo been reckoned excluſive of Sunday, that not being a day on which the priſoner may be preſumed to be preparing for his defence; though the ſtatute does not require this caution, nor is it of abſolute neceſſity.

Though

Though theſe acts mention only "*the whole indictment*," yet the priſoner ought to have a copy of the caption delivered to him with the indictment; and it was ſo ordered at a meeting of all the judges upon the intended trial of Greg, for holding treaſonable correſpondence with France: for this is in many caſes as neceſſary to enable him to conduct himſelf in pleading as the other; and ſuch is now the conſtant practice. But after pleading it is too late to object either to the want of a copy or to any inſufficiency in it; for that admits it to be ſufficient.

Ch. II. § 50. *Trial. Regulations.*

§ 50.

What are ſufficient Copies of Indictment.

Foſt. 229, 30. Rookwood's caſe, 4 St. Tr. 663. 1 MS. Sum. 59. Greg's caſe, 12th Jan. 1707. MS. Tracy. Cooke's caſe, Salk. 634. ante, f. 46.

Of Panel.

On the other hand, though the words of the ſtatute of William are, that the priſoner ſhall have a copy of the panel "duly returned by the ſheriff;" yet if the copy be delivered before the return of the precept it will be ſufficient, within the words and intent of the act, if the priſoner have the advantage of it in the time allowed by law before his trial, the intent of which was to give him an opportunity of preparing his challenges. This was ſo ruled in Rookwood's caſe, and alſo at a meeting of the judges on Greg's caſe.

Foſt. 230. 2 Hawk. ch. 41. ſ. 23. 1 MS. Sum. 60. MS. Tracy. Rookwood's caſe, 4 St. Tr 667. Greg's caſe, ſup.

In the caſe of Lord George Gordon the attorney-general moved the court of K. B. for a rule upon the ſheriff to deliver to the proſecutor a liſt of the jurors whom he intended to return on the panel, in order that the proſecutor might be enabled to deliver ſuch liſt to the priſoner; and the rule was made accordingly.

Ld George Gordon's caſe, H. 21 G. 3. Dougl. 591.

Where ſo many of the jurors were challenged that there were not left a ſufficient number, the court, which ſat under the commiſſion of gaol delivery at St. Margaret's Hill for the trial of the rebels in 1746, awarded ore tenus a new panel, and adjourned to another day, to give time for the priſoners to have copies of the panels purſuant to the ſtatute of William.

Foſt. 63, 4.

Previous to the trials of the late ſtate priſoners for high treaſon, it was found that the panel of the jurors, returned both to the court of gaol delivery and of oyer and terminer, was incorrect in not ſtating the profeſſions of the ſeveral jurors, and in other reſpects. Whereupon a motion was made on the part of the crown in the court of gaol delivery, which was then ſitting, that the ſheriff might have liberty to amend the panel, by correcting miſtakes and adding the profeſſions of the jurors returned; which was thereupon directed

Rex v. Thomas Hardy & others, O.B. Oct. 1794. MS. *Vide* tit. Jury, Tales.

Ch. II § 50. *Trial. Regulations.*

to be done, upon advice among the judges who preſided; and copies of the panels ſo amended were delivered to the priſoners, purſuant to the directions of the ſtatute.

Layer's caſe, 6 St. Tr. 246.

In Layer's caſe, the name of a juryman was by miſtake written Longbotham inſtead of Longbothom, both in the original panel and in the priſoner's copy; but the ſound being the ſame, and written both ways, it was ruled to be ſufficient.

Stone's caſe, B.R. H. 36G.3. 6 Term Rep. 531.

In Stone's caſe, who was tried at bar for high treaſon, his counſel objected to one of the jurymen as being ill deſcribed; his place of abode being ſtated to be Grafton-ſtreet; and as it was ſaid, there being ſeveral ſtreets of that name, that there ſhould have been ſomething added to diſtinguiſh which Grafton-ſtreet was meant: but the objection was over-ruled.

Layer's caſe, 6 St. Tr. 323.

In Layer's caſe the court refuſed to order the venire to be read to the priſoner after his conviction.

§ 51. *Courſe of Proceedings after Bill found and before Trial.* Foſt. 1.

In the courſe of the proceedings under the ſpecial commiſſion in 1746, for the trial of the rebels, after the bills of indictment had been found againſt them, the priſoners were brought to the bar and informed that bills had been found againſt them, of which they ſhould ſoon have copies; which were accordingly delivered to them after the riſing of the court on the ſame day. A different courſe was purſued upon the late proceedings againſt Hardy and others for high treaſon. On the grand jury's returning the bill "found," Lord C. J. Eyre, who was the only judge in court, deſired to know whether there were any perſons preſent who were concerned as attornies or agents for the priſoners: if there were, he wiſhed it to be underſtood, that on application made either to the court of oyer and terminer or of gaol delivery at the Old Bailey, or to either of the judges in thoſe commiſſions, counſel would be aſſigned to the priſoners; and that ſuch counſel and the agents of the priſoners ſhould have proper acceſs to them. That his reaſon for mentioning this was, that the priſoners might not be haraſſed by being brought up to be informed that bills were found againſt them, and then be remanded. This was done in conſequence of a previous meeting at the Chief Juſtice's chambers, when the former precedent was conſidered, and the preſent mode agreed to be adopted as the more convenient. In truth, as far as reſpects notice of the indictment, all that the ſtatute either of William or of Anne requires is, that the priſoner ſhould have a copy

Rex v. Thomas Hardy & others, O.B. Oct. 1794, MS.

of

Ch. II. § 51. *Trial. Regulations.*

of it, which ſeems in itſelf to be an adequate notice, and ſufficient for all the purpoſes of the act. And ſo it was conſidered by one of the judges upon that occaſion. But the propriety of this kind of communication, where the priſoners are not brought to the bar, as they were in 1746, ſeems evident on another account, namely, to enable them if they pleaſe in the firſt inſtance to apply for counſel to be aſſigned to them, whom they may conſult as ſoon as they are ſerved with copies of the indictment. For the ſt. 7 W. 3. requiring ſuch copies to be delivered, aſſigns as a reaſon for it, to enable the priſoner "*to adviſe with counſel thereupon to plead and make his defence.*" Therefore, by fair conſtruction of the whole law upon this ſubject, ſuch opportunity ought to be afforded to the priſoner, as that he may, if he pleaſe, have counſel aſſigned to him ſo long before his trial as the law expreſsly requires that he ſhall be furniſhed with a copy of the indictment, namely, 10 days.

§ 52. *Proceſs for witneſſes and examination on oath.*

Alſo by the act of King William the priſoner "ſhall have the like proceſs of the court where he ſhall be tried, to compel his witneſſes to appear at the trial, as is uſually granted to compel witneſſes to appear againſt priſoners in the like caſe;" and his witneſſes are to be heard upon oath. Though now by the ſtat. 1 Ann. c. 9. the priſoner's witneſſes in all caſes of felony as well as treaſon are to be heard upon oath.

7 W. 3. c. 3. ſ. 7.

1 Ann. ſt. 2. c. 9. ſ. 3.

Of the Indictment and Evidence—Witneſſes and Confeſſion.

§ 53. *General words.*

Every indictment for high treaſon muſt lay the offence to have been committed *traiterouſly*, and ſhould conclude *againſt the duty* of the defendant's *allegiance*. A charge of doing any thing *ſeditiouſly* does not amount to a charge of treaſon. Where the traitor is a natural-born ſubject, it is uſual to lay the offence to have been done againſt his *natural* allegiance; but that is not neceſſary; for in the general word *allegiance* is compriſed every ſpecies of it; and the addition of the word *natural* is even faulty where the defendant is a foreigner. Yet if that fact appeared upon the face of the indictment, I conceive that the word *natural* might be rejected as repugnant and ſurpluſage.

3 Inſt. 4. 15. 1 MS. Sum. 76. 88. Poſt. 186. Cranburn's caſe, 4 St. Tr. 700. Salk. 633. Tucker's caſe, 4 Mod. 163—6. 1 Hale, 59. 77. 92. Dy. 145. a. Calvin's caſe, 7 Co. 6. b. 1 Hawk. ch. 17. ſ. 5. *Vide* poſt. ſ. 59.

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It is ſufficient if the ſpecies of treaſon, ſuch as compaſſing the king's death, be laid to be done traitorouſly: there is no neceſſity to charge every ſeparate overt act relating thereto to be ſo done. And it is ſufficient in ſtating ſuch ſeveral overt acts to couple them together by an *and*, without repeating *that the jury further preſent, &c.* or the like; but that form is the proper one in laying diſtinct ſpecies of treaſon.

1 MS. Sum. 5. 76, 77. Cranburn's caſe, 4 St. Tr. 701. Salk. 633.

Ante, f. 46.

In what manner an indictment may be quaſhed for inſufficiency I have already obſerved.

§ 54. *Particular treaſon muſt be laid, and overt acts.*

In every indictment for high treaſon upon the ſt. 25 Ed. 3. for compaſſing the death of the king, or of ſuch of his family as are therein named, or for levying war, or adhering to his enemies, the particular ſpecies of treaſon muſt be charged in the very terms of the ſtatute, being a declaratory law, as the ſubſtantial offence, and then ſome overt act muſt be laid as the means made uſe of to effectuate the traiterous purpoſe. For though the words of the ſtatute, "and thereof be proveably (i.e. on ſufficient proof) attainted by open deed," &c. come immediately after the clauſe of adhering to the king's enemies, yet they refer to all the treaſons before mentioned. The overt acts ſo laid are in truth the charge to which the priſoner muſt apply his defence. And therefore it is in no caſe ſufficient to allege that the priſoner compaſſed the king's death, or that he levied war againſt him, or adhered to his enemies; for upon a charge ſo general and indefinite, he cannot know what acts he is to defend. The particular acts of compaſſing and adherence muſt be ſet forth: and in the other inſtance it muſt be alleged that he aſſembled with a multitude armed and arrayed in a warlike manner, and levied war. The indictment againſt Purchaſe and Damaree for pulling down meeting-houſes, charged that they, with a multitude to the number of 500, to the jury unknown, armed and arrayed in a warlike manner with clubs and ſtaves, and other arms offenſive and defenſive, levied war againſt the queen. No exception was taken to the indictment by Damaree's counſel: but on behalf of Purchaſe it was objected, that there ought to have been an overt act laid of the treaſon; becauſe there being ſuch a variety of facts which amount to levying war, if the particular facts intended to be brought forward againſt the priſoner were not alleged, he could not know how to make his defence. But it

1 MS. Sum. 85, 6, 7. Foſt. 194. 220. 2 Hale, 108. 121. 138. 144. 149. Vaughan's caſe, 5 St. Tr. 18. 21, 2. Salk. 634. 2 Hawk. ch. 17. § 29. Burnet's MS. 15. Ante, f. 6.

2 Hale, 150.

Caſe of Purchaſe and Damaree, O. B. Seſſ. before Eaſt. term, 3 Ann. MS. Tracy. *Vide* 8 St. Tr. 219. 267. Foſt. 213. 4 C. ante, f. 17.

was

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was reſolved by all the judges, upon conference, that the indictment was good, and that levying war being an overt act of itſelf, no other overt act need be alleged. They agreed, however, that it ought to appear ſufficiently upon the indictment that a war was levied, and that they appeared in ſuch warlike manner; and that an indictment generally that A. levied war is not good. The indictments in Benſtead's caſe, and in the caſe of the apprentices for pulling down bawdy-houſes, were framed as this is. And they all reſolved that the ſtat. 7 W. 3. did not make the laying an overt act neceſſary where it was not ſo before.

5 St. Tr. 20, 1.

Vide 1 Hawk. ch 17. ſ 29. 3 MS. Sum. 64. Benſtead's caſe, Cro Car. 583. Kel. 70. Vaughan's caſe, 5 St. Tr. 21.

As to what may be laid as overt acts of each reſpective treaſon, of compaſſing the king's death, levying war, and adhering to his enemies, I have before had occaſion to conſider at length, in treating of thoſe treaſons. And as to the other treaſons mentioned in the ſtatute, they ſeem to be overt acts of themſelves; and therefore require nothing more to be alleged than the facts themſelves conſtituting the treaſon.

Ante, f. 7, 8, 9, 12—22.

I have alſo had occaſion to notice, that one ſpecies of treaſon may be laid and proved as an overt act of another. The inſtances are unneceſſary to be repeated here. Yet it ſeems that no overt act can be given in evidence under any branch of treaſon, unleſs it be expreſsly laid as an overt act of ſuch treaſon; although it be laid as an overt act of ſome other treaſon in the ſame indictment.

Ante, f. 9. Foſt. 197. 211. 2 Hale, 121, 2. 144.

§ 55. *Overt acts. Words.*

There are however ſome other overt acts to be examined, which being of a general nature, and requiring peculiar conſideration, I have reſerved to this place: theſe are words and writings.

Whatever doubts may have been formerly entertained, or however the law may have been ſtretched in arbitrary times to reach particular men, it is now ſettled that bare words not relative to any act or deſign, however wicked, indecent, or reprehenſible they may be, are not in themſelves overt acts of high treaſon, but only a miſpriſion, puniſhable at common law by fine and impriſonment, or other corporal puniſhment (*a*). They are frequently ſpoken in heat without any

Foſt. 200. 202. 204. 7. 346 4 Blac. Com. 80. 123. Cro. Car. 117. 125. 332. 3 Inſt. 14. 140. 1 Hale, 111. 114 —117. 315. 322, 3. 1 Hawk. ch. 17. ſ. 33, &c. 37. 39. Charnock's caſe, 1 Salk. 631. 4 St Tr. 593. 1 MS. Sum 13, 14. Kel. 13. in margin. T. Ray 408. Burnet's MS. 73.

(*a*) By a late temporary act of 36 Geo. 3. c. 7. ſ. 2. the operation of which ſo far as concerns this matter is now ſpent, ſeditious words or writings in hatred or contempt of the king or government were made puniſhable for the firſt time as other high miſdemeanors, and for the ſecond time by tranſportation for ſeven years.

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intention to act accordingly; they are ſtill more frequently miſtaken or miſ-remembered; and ſometimes it is to be feared the ſenſe of them knowingly perverted. It is one of

1 Hale, 309. the cauſes mentioned in the preamble of the ſtatute 1 Mar. ſt. 1. c. 1. for repealing all intermediate treaſons created ſince the ſtat. 25 Ed. 3. on account of the ſeverity of thoſe laws that made words only, without other fact or deed, to be high treaſon.

Crohagan's caſe, Cro. Car. 332. But words may expound an overt act, and ſhew with what intent it was done. As in Crohagan's caſe, who when at Liſbon ſaid, that he would kill the king if he could come to him; and afterwards coming to England, the overt act of coming here was explained by thoſe words, and ſhewn to have been with intent to carry his purpoſe into execution; which

Foſt. 202. ſeems to be the proper explanation of that caſe; though the ſpeaking the words, as well as the act of coming to England,

Foſt. 204. 1 Hawk. ch. 17. ſ. 39. in order to kill the king, were laid as diſtinct overt acts. On the other hand, words of advice or encouragement to deſtroy the king, and above all, conſultations for that purpoſe, are entitled to far different conſideration: they expreſsly relate to ſuch an act or deſign in contemplation; and come directly and properly under the notion of means made uſe of for that end. But the conſultation or incitement is the overt

Coke's caſe, Kel. 12. 23. act, and the words are properly evidence of it. One charge againſt Coke, one of the regicides, was the ſpeaking as counſel againſt the king on his trial.

4 Ann c. 8. 6 Ann. c. 7. ſ. 2. *Vide* p. ſt. the next ſection. By the ſtat. 4 Ann. c. 8., re-enacted by ſtat. 6 Ann. c. 7., to affirm maliciouſly and directly, in preaching, teaching, or adviſedly ſpeaking, that there is any right or title to the crown, other than according to the act of ſettlement; or that the king and parliament have not a right to limit the ſucceſſion, is a præmunire. By ſ. 3. of the latter ſtatute it is provided, that no perſon ſhall be proſecuted, by virtue of the act, for any words ſpoken, unleſs information thereof be given upon oath to a juſtice of peace within three days after ſuch words ſpoken, and the proſecution be within three months after ſuch information: and that no perſon ſhall be convicted, by virtue of the act, for ſuch words, but by the oaths of two credible witneſſes.

13 Car. 2. c. 1. The ſtat. 13 Car. 2. had before declared it a præmunire to aſſert, maliciouſly or adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority

thority without the king. And, generally ſpeaking, any words, acts, or writing, tending to vilify or diſgrace the king, or to leſſen him in the eſteem of his ſubjects, or any denial of his right to the crown, even in common and unadviſed diſcourſe, amount at common law to a miſpriſion, puniſhable by fine and corporal puniſhment. Ch. II. § 55. *Indictment and Evidence.* 4 Blac. Com. 123.

§ 56. *Writings.*

Writings of this nature, inaſmuch as the very act betokens greater deliberation and malignity, may, I think, with ſtrict propriety, be urged more ſtrongly againſt the writer, as evidence of a treaſonable intent. But this muſt be taken with ſome reſerve. Writings plainly applicable to ſome treaſonable deſign in contemplation are clear and ſatisfactory evidence of ſuch deſign, although not publiſhed. If, ſay Mr. Juſtice Foſter and Mr. Juſtice Blackſtone, the papers found in Sidney's cloſet had been plainly relative to the other treaſonable practices charged in the indictment, they might have been read in evidence againſt him. The papers found in Lord Preſton's cuſtody, thoſe found, where Mr. Layer had depoſited them, and the intercepted letters of Dr. Henſey, were all read in evidence as overt acts of the treaſons reſpectively charged on them; for they were all written in proſecution of certain determinate purpoſes which were treaſonable, and then in the contemplation of the offenders: and ſuch papers being found in the cuſtody of the priſoners are admiſſible in evidence, without any proof of the hand-writing being theirs. Evidence of the ſame nature was received in the caſe of Tooke and others at the Old Bailey, in 1794; as alſo in Stone's caſe, who was tried at the bar of the court in Hilary 36 Geo. 3. And not only was evidence received of ſuch papers as were found in their own poſſeſſion, but alſo of ſuch as were found in the poſſeſſion of their accomplices; the connection between them being firſt proved. But writings which have no connection with any actual purpoſe of a treaſonable nature, while they remain unpubliſhed, will not amount to an overt act of treaſon; but the fact of publiſhing them is an overt act, and may be evidence of the treaſonable purpoſe which they import. And this I think upon the ſame principle as words of incitement to treaſon are evidence of ſuch incitement. Thoſe are addreſſed to ſome one or more individuals; theſe to the Foſt. 198. 4 Blac. Com. 80. *Vide* Gregg's caſe, 10 St. Tr. App. 77. Layer's caſe, 6 St. Tr. 279. Dr. Henſey's caſe, 1 Burr. 644. Layer's caſe, 6 St. Tr. 279. Tooke's caſe, MS. Stone's caſe, MS. and 6 Term Rep. 527. Foſt. 198. 1 Hale, 112. 118. 1 Hawk ch. 17. ſ. 31, 32. 3 Inſt. 14. Burnet's MS. 13. Twyn's caſe, Kel. 22, 23. 1 MS Sum. 15. Sed *vide* 2 Roll. Rep. 89, 90.

Ch. II. § 56. *Indictment and Evidence.*

whole body of the people. But in both caſes it ſeems that the intent to incite ſhould appear to the ſatisfaction of the jury. So in all writings of a treaſonable nature it appears to me that not only they ſhould, in the judgment of the court and jury, import the treaſonable purpoſe in proof of which they are adduced in evidence, but that the jury ſhould be ſatisfied that the publication was made in furtherance of ſuch purpoſe. Though if the immediate tendency of ſuch writings be to cauſe the dethronement of the king, that would be proof of compaſſing his death; becauſe the law has adopted it as ſuch. In Twyn's caſe, a publication printed and diſtributed by him, exhorting the people to throw off their allegiance and put the king to death, was laid as the overt act of compaſſing the king's death; and the priſoner was convicted and executed. But by the ſtat. 4 Ann. c. 8. and 6 Ann. c. 7, it is made a ſubſtantive treaſon maliciouſly, adviſedly, and directly to affirm, in print or writing, that there is any right or title to the ſucceſſion of the crown, other than according to the act of ſettlement; or that the parliament has not a right to limit and bind the ſucceſſion. On this ſtatute Mr. Juſtice Foſter remarks, that no man is to be argued into the penalties of it by inferences and concluſions; but the criminal poſition muſt be *directly* as well as maliciouſly and adviſedly maintained in order to bring him within it.

Twyn's caſe, Kel. 22.

4 Ann. c. 8. 6 Ann. c. 7.

Foſt. 201.

Vide 26 H. 8. c. 13. 1 & 2 P. & M. c. 10. 1 Eliz. c. 5. 13 Eliz. c. 1. 13 Car. 2. c. 1. *Vide* 1 Hale, 261, 2.

Upon no other principle than what I have before advanced can the various temporary ſtatutes be accounted for, which have, from time to time, been paſſed, making the publiſhing by writing of diſloyal or ſeditious poſitions high treaſon. They were meant to repreſs and puniſh the very act of publiſhing ſuch writings; although the publiſher had no other deſign in ſo doing than to vent his ſpleen againſt the government, without any intention of ſtimulating others to any treaſonable act. For though it muſt be admitted that the argument is not ſo ſtrong in thoſe inſtances as in the caſe where bare words of the like import have by ſeveral temporary ſtatutes been made felony and miſdemeanor; yet the frequent recurrence of ſtatutes of the former kind upon ſo many occaſions and at different periods, do at leaſt imply great doubts in the legiſlature whether the publication of ſuch ſeditious writings did of itſelf, without any intention of the publiſher

Vide Foſt. 201. *Vide* ſt. 5 Eliz. c. 15. againſt fond and fantaſtical prophecies with intent to make inſurrection, diſturbance, &c.

publiſher thereby to promote ſome treaſonable purpoſe in contemplation, amount to high treaſon. Ch. II. § 56. *Indictment and Evidence.*

§ 57. *Evidence of overt acts not neceſſary to be laid.*

But though ſome overt acts muſt be laid and proved in the inſtances before mentioned, yet it is not neceſſary that the whole detail of the evidence ſhould be ſet forth. The common law never required this exactneſs; and the ſtatute of William does not make it neceſſary to charge particular facts where it was not neceſſary before. It is ſufficient that the charge be ſtated with reaſonable certainty, ſo that the priſoner may be appriſed of the nature of it. Thus the laying, that A. and B. met and propoſed the means how to effect the king's death is ſufficient, without alleging the particular means upon which they agreed, which is matter of evidence.

1 MS. Sum. 13. 85. 87. Foſt. 194. 220. 1 Hale, 122. Lowick's caſe, 4 St. Tr. 722. Rookwood's caſe, 4 St. Tr. 696, 7.

The ſtatute of William directs, that "no evidence ſhall be admitted or given of any overt act that is not expreſsly laid in the indictment againſt any perſon or perſons whatſoever." This rule, though expreſsly preſcribed by the ſtatute, in order to ſuppreſs ſome abuſes that had appeared in the heat of proſecutions for treaſon, is in truth no more than the common law itſelf directs generally. For in no caſe is a priſoner bound to anſwer unprepared for every action of his life, but only to that which is the ſubject of the indictment againſt him: and therefore no evidence ought to be admitted in any proſecution but what immediately relates to the crime imputed. This I think was always the law as well as the juſt rule in this particular caſe; though it muſt be owned that ſome high authorities did ſeem to countenance a contrary doctrine; which juſtifies the caution and wiſdom of parliament in ſecuring the obſervance of the rule by a legiſlative proviſion. But the meaning of the ſtatute has often been attempted to be ſtrained the other way; and ſuch a conſtruction has been argued for as would, if it had prevailed, have made it neceſſary to ſet forth ſpecifically every fact intended to be proved at the trial. The true ſenſe of the clauſe is, that no overt act amounting to a diſtinct independent charge, though falling under the ſame head of treaſon, ſhall be admitted in evidence, unleſs it be expreſsly laid in the indictment: but an overt act may be given in evidence, though it be not expreſsly laid, or not well laid in the indictment, if it amount to direct proof of any overt act which is well laid. Thus in the caſe of Rookwood, who was

7 W. 3 c. 3 ſ. 8.

1 MS. Sum 73. Foſt. 246. 1 Hale, 121. *Vide* Kel. 8. the 5th reſolution on the trial of the regicides.

Vide Foſt. 246. Kel. 8. Hale, 121, 122.

Foſt. 245. 1 MS. Sum. 71. Vaughan's caſe, 5 St. Tr. 20, 1, 2. MS. Tracy, 23.

MS. Burnet, 16.

Rookwood's caſe, 4 St. Tr. 687. 690. 695, 696, 7.

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was indicted for compaſſing King William's death, two of the overt acts charged were, that he and others met and conſulted upon the proper means for way-laying the king, and attacking him in his coach; and alſo, that they agreed to provide 40 men for that purpoſe. Upon this indictment the counſel for the crown were allowed to give in evidence a liſt of the names of a ſmall party who were to join in the attempt, of which the priſoner was to have the command, with his own name at the head of the liſt as their commander: for though this circumſtance was not charged in the indictment, yet it amounted to a direct proof of the overt acts laid, viz. the meeting and conſulting together how to kill the king, and their agreeing to provide 40 men for that purpoſe. And as this fell under the ſame ſpecies of treaſon, it was very proper evidence. In Major Lowick's caſe, upon the ſame charge, the court declared, that even if the circumſtance of providing 40 men had not been laid in that indictment, the evidence would ſtill have been admiſſible; for it was a direct proof of the firſt overt act laid, the meeting and conſulting on the means of killing the king. So in the caſe of Layer, his correſponding with the pretender, though not laid in the indictment, and though made a ſubſtantive treaſon by the ſt. 12 & 13 W. 3. was admitted in evidence; becauſe it tended directly to prove one of the overt acts laid, namely, his conſpiring to depoſe the king, and to place the pretender on the throne. The like rule was obſerved in the caſes of Deacon and Sir John Wedderburne, upon the ſpecial commiſſion in Surry in 1746. In the former, his counſel objected to the receiving the evidence of one Craig a printer, touching the priſoner's obliging him to print the pretender's manifeſto at Mancheſter, and his publiſhing it there while the rebel army was in the town; and alſo to the reading of the manifeſto itſelf, becauſe it was an overt act not laid in the indictment: but it was anſwered by the court, that an overt act not laid may be given in evidence, if it be a direct proof of any which is laid: That one of the overt acts laid being the aſſembling and marching modo guerino in order to depoſe the king, and ſet the pretender on the throne; and it being proved that the priſoner was with the reſt of the rebel army at Mancheſter, and appeared in a hoſtile manner there; the fact of his cauſing to be printed and publiſhed the pretender's manifeſto there was ſtrong and direct proof

Major Lowick's caſe, 4 St. Tr. 722.

Layer's caſe, 6 St. Tr. 286, 7.

Caſes of Deacon and Sir John Wedderburne, Foſt. 9. 22.

(I.e. C. J. Willes, Abney and Foſter, Juſtices.)

proof of his having joined the army for the purpoſe mentioned in the indictment. In Sir John Wedderburne's caſe the proof offered was, that he was appointed by the pretender's ſon collector of the exciſe, and that he did actually collect it in ſeveral places where the rebel army lay, by virtue of that appointment, for the uſe of the rebel army, with whom he was proved to have been preſent at divers places. The ſame objection was urged, and the ſtat. 7 W. 3. particularly relied on, but the court over-ruled it for the ſame reaſon given in Deacon's caſe.

On the other hand, if the overt act offered in evidence and not laid in the indictment be no direct proof of any of the overt acts charged, but merely go to ſtrengthen the evidence or ſuſpicion of ſome of thoſe overt acts by a collateral circumſtance, ſuch evidence cannot be admitted, notwithſtanding the opinion of Lord Hale to the contrary. As in the caſe of Captain Vaughan, who was indicted for adhering to the king's enemies on the high ſeas: The overt act laid was his cruiſing upon the king's ſubjects in a veſſel called the Loyal Clencarty; and the counſel for the crown offered to give in evidence, that he had ſome time before cut away the Cuſtom-houſe barge, and had gone cruiſing in that veſſel; but as that was no proof of his cruiſing in the Loyal Clencarty, the court rejected the evidence.

Foſt. 246. 1 MS. Sum. 72.

1 Hale, 121, 2. Vaughan's caſe, 5 St. Tr. 22.

§ 58. *What certainty ſufficient in laying and proving words and writings.*

The rule abovementioned applies alſo as to the manner in which words or writings are to be laid in the indictment, and proved in evidence. Upon an indictment for compaſſing the king's death, in which a treaſonable declaration of the priſoner was alleged as an overt act, but was only ſet forth in ſubſtance, it was objected in arreſt of judgment, that the words of the declaration were not ſpecified; but the court unanimouſly held the indictment ſufficient. It was laid, that the declaration contained incitement, perſuaſions, and promiſes of reward to induce the people to join in rebellion, which was an overt act of the treaſon charged, namely, the compaſſing the king's death; and this being the ſubſtantial charge, it was ſufficiently ſet forth. In the caſes of Coleman and Lord Preſton, the ſubſtance only and purport of the letters found upon him were ſet forth. In Staley's caſe, the words were ſpoken in French, and the import of them ſtated in Latin. In Francia's caſe, the like rule was laid

1 MS. Sum. 86.

Coleman's caſe, 2 St. Tr. 661. Lord Preſton's caſe, 4 St. Tr. 411. Staley's caſe, 2 St. Tr. 655. Francia's caſe, 6 St. Tr. 73—7. So Layer's caſe, 6 St. Tr. 330.

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laid down, that it is not neceſſary to ſet forth the letters themſelves of a treaſonable correſpondence; it is ſufficient to ſtate the ſubſtance and intent of them; for they are evidence of the ſecret compaſſing and imagination of the heart. In Dr. Drake's caſe it was ſaid by Lord Holt, that either the very words of a libel might be charged; but then the ſmalleſt variation which changed the word was fatal (*a*); or the ſubſtance and effect of them may be ſtated; and in that caſe if the ſenſe be rightly ſtated, it is ſufficient. And at the Cornwall Summer aſſizes in 1735, Lord Hardwicke ſaid that this was law; though it was ſafer to lay the indictment both ways, viz. in one count the very words, in another the ſubſtance and ſenſe of them only.

Dr. Drake's caſe, Salk. 660.

(*a*) The variance was *nor for not.*

Chapple's notes.

In the inſtances of Gregg and of Dr. Henſey, the letters reſpectively ſent by them with intent to convey intelligence to the enemy were ſtopped at the poſt-office. In the caſe of the former, who pleaded guilty, the indictment charged, that the letters were ſent from the place where the venue was laid into parts beyond the ſeas, to be delivered to the enemy. The indictment in Dr. Henſey's caſe with more propriety ſtated, that the letters were ſent from the place where the venue was laid, to be delivered in parts beyond the ſeas to the enemy.

Foſt. 218. Gregg's caſe, 20 St. Tr. App. 77. Dr. Henſey's caſe, 1 Burr. 642.

In the caſe of De la Motte, on ſuſpicion of the traiterous correſpondence which he was carrying on with the French government, then at war with this country, the packets were ſecretly opened, copies taken of their contents, and they were afterwards ſealed again and forwarded to their place of deſtination. Perſons who knew the priſoner's hand-writing proved that the original letters were written by him; and the copies being proved to have been examined were admitted in evidence.

De la Motte's caſe, O. B. July 1781, cor. Buller and Heath, Js. MS. Gould, J.

§ 59. *Surplusage need not be proved.*

If but one of ſeveral overt acts be well laid and proved, that is ſufficient. And if it be laid with circumſtances not neceſſary to conſtitute the act high treaſon they need not be proved, but may be rejected as ſurpluſage. As in the caſe of treaſon in levying war; if the overt act be an arraying in an hoſtile manner, and thereby killing divers of the king's ſubjects; if the arraying in an hoſtile manner be proved, that is ſufficient, without proof of the reſt. Or if it be, as in Lowick's caſe, that A. and B. met and propoſed the king's death,

2 MS. Sum. 13. Foſt 194. 1 Hale, 122. Lowick's caſe, 4 St. Tr. 722. Layer's caſe, 6 St. Tr. 329, 330. Burnet's MS. 16. Vaughan's caſe, 5 St. Tr. 25, 6. Ante, f. 46.

death, and the particular meaſure by which they purpoſed to effect it be not well laid, this latter will not vitiate the reſt.

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§ 60.

Neither is the time or place laid in an overt act charged in the indictment more neceſſary to be ſtrictly proved in this than in any other caſe, provided a time be laid before the finding of the bill, and a place be laid within the county. In Mr. Townly's caſe it was ſtrongly preſſed as an objection under the clauſe in the ſtat. of William, above referred to, that all the overt acts proved were ſubſequent to the time laid in the record. But all the court were clearly ſatisfied that ſuch ſtrictneſs was not neceſſary, but that it was ſufficient, as at common law, to prove the overt acts on any day before the finding of the bill. The ſame was ruled on Lord Balmerino's trial in the Houſe of Lords, by the advice of all the Judges.

Time and place. Charnock's caſe, 4 St. Tr. 570. Townley's caſe, Foſt. 8, 9. Ante, f. 57. *Vide* 3 Inſt. 230. 1 Hale, 361. 2 Hale, 179.291. Kel. 16. Ld. Balmerino's caſe, Dom. Proc. 9 St. Tr. 607.

§ 61.

I have before had occaſion to treat of the place where treaſons, committed both abroad and at home, ſhall be tried, and how the law ſtands in that reſpect. But in all caſes of treaſon within the realm, ſome overt act muſt be proved in the county where the indictment is laid and the trial had, according to the courſe of the common law. But, as in the caſe of compaſſing the king's death, any act done towards the accompliſhment of that object within the county is ſufficient. Lord Preſton and two other gentlemen had procured a veſſel to tranſport them to France, but were ſtopped before they got out of the river; and their papers were ſeized. Amongſt thoſe papers was found a ſcheme, intended to be laid before the French government, for invading the kingdom. Lord Preſton inſiſted that no overt act was proved upon him in Middleſex, where all the overt acts were laid; for he was taken with the papers in the county of Kent. But the court told the jury, that if they believed that he had an intention of going to France with thoſe papers, for the purpoſe charged in the indictment, his taking boat in Middleſex, in order to go on board the veſſel, was a ſufficient overt act in that county. But after proof of an overt act in the county in which the treaſon is laid, evidence may be given of any other overt acts of the ſame ſpecies of treaſon in other counties. In this ſenſe the paſſage in Kelyng muſt

Proof of overt act in the county where trial had. Ante, f. 40 41. 1 & 2 Ph. & M. c. 10. f. 7. 2 MS. Sum. 186.

Ld. Preſton's caſe, 4 St. Tr. 447, 8. *Vide* Foſt. 1, 6. Ante, f. 9.

2 MS. Sum. 485. Sir H. Vane's caſe, Kel. 14, 15. Parkin's caſe, 4 St. Tr. 639, 640. per Holt, C. J. Layer's caſe, 6 St. Tr. 200. 314 319. poſt. f. 65.

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muſt be underſtood, where it is ſaid to have been reſolved in Sir H. Vane's caſe, that the treaſon laid in the indictment being the compaſſing the king's death, which was in the county of Middleſex, and the levying war being laid only as *one of the overt acts*; though it were laid to be in Middleſex, yet a war levied by the priſoner in Surry might be given in evidence; for not being laid as the treaſon, it is a tranſitory thing which may be proved in another county: otherwiſe, if the indictment had been for levying war as a ſubſtantive treaſon.

Vide poſt. f. 65.

2 Hal. Sum. 185.

But further, it is obſervable that Kelyng appears to confine the rule for admitting in evidence other overt acts of the ſame treaſon in other counties (after proof of an overt act in the county where the offence is laid) to the caſe of compaſſing the king's death; and it is ſaid that treaſon in levying war is local. But quære whether this diſtinction can be right. The caſe in *Kel.* 15. and the caſe of the Earl of Eſſex were indictments for compaſſing the king's death, and the levying war was laid as an overt act. And where is the difference, in point of reaſon or principle, whether the levying war be charged as the treaſon indicted, with overt acts laid of that fact, or whether the ſame facts be charged as overt acts of another branch of treaſon? In the caſe of Damaree, Purchaſe, and Willes, for high treaſon in conſtructive levying of war, evidence was given of houſes pulled down in London as well as in Middleſex, where the priſoners were indicted. In the proſecutions for the rebellions in 1745 and 1746 evidence was given of the march of the rebels, and of the part the priſoners bore in the rebellion in every county through which they paſſed; and yet theſe were caſes of indictments for levying war; but then ſome overt acts were proved in the county laid in the indictment. In Deacon's caſe in particular, evidence was permitted to be given of overt acts done in other counties, though all the overt acts were laid to be done in Cumberland; an overt act being firſt proved in that county.

Vide 8 St. Tr. 218, &c.

Deacon's caſe, 1746. Foſt. 8.

§ 62. *How Accomplices and Receivers are to be charged.*

Ante, f. 33. 37.

As all accomplices in treaſon are principals, as much as thoſe who do the act, there is nothing to remark of difference between them in reſpect of the indictment: and I have before conſidered what evidence is neceſſary or ſufficient to

connect them altogether, ſo as to let in proof of their reſpective acts againſt each other. Ch. II. § 62. *Indictment and Evidence.*

But an indictment againſt a receiver of a traitor, after the fact, muſt charge him ſpecially with the receipt, and not generally, that he did the thing; which is otherwiſe in caſe of one who is a procurer, counſellor, or aſſenter. 1 Hale, 214. 238. Conier's caſe, Dy. 296. Foſt. 345. Ante, ſ. 35.

Witneſſes.

§ 63. *Witneſſes neceſſary to ſupport the Indictment.*

It is an eſſential requiſite on the trial of this offence, that the treaſon charged in the indictment ſhould be proved by two witneſſes. This ſtands on ſeveral acts of parliament, which I will firſt ſet forth, and then notice the conſtruction which has been made upon them.

The ſtat. 1 Ed. 6. c. 12. ſ. 22. enacts, "that no perſon ſhall be indicted, arraigned, condemned, or convicted for any treaſon, petty treaſon, or miſpriſion of treaſon, unleſs he be accuſed by two ſufficient and lawful witneſſes, or ſhall willingly without violence confeſs the ſame." 1 Ed. 6. c. 12. ſ. 22.

The ſtat. 5 & 6 Ed. 6. c. 11. ſ. 12. enacts, "that no perſon ſhall be indicted, arraigned, condemned, convicted, or attainted for any treaſons that then were or after ſhould be, unleſs thereof accuſed by two lawful accuſers (i. e. witneſſes); which ſaid accuſers at the time of the arraignment of the party accuſed, if they be then living, ſhall be brought in perſon before the accuſed to prove him guilty of the treaſons or offences contained in the indictment, unleſs the ſaid party arraigned ſhall willingly without violence confeſs the ſame." 5 & 6 Ed. 6. c. 11. *Vide* 1 Hale, 295. 7.

Then by the ſtat. 1 & 2 Ph. & Mary, c. 10. it is enacted, "that all trials for any treaſon ſhall be had and uſed only according to the due order and courſe of the common law." And by another ſtatute of the ſame ſeſſion it is enacted, "that every perſon who ſhall be accuſed or impeached of any of the offences contained therein (*a*), or of any other offence concerning the impairing, counterfeiting, or forging of any coin current within this realm, ſhall and may be indicted, arraigned, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as hath been uſed and accuſtomed within the realm before the 1 Ed. 6." 1 & 2 Ph. & M. c. 10. c. 11. ſ. 3. (*a*) *i. e.* offences relating to the coin.

Laſtly, the 7 W. 3. c. 3. enacts, "that no perſon whatſoever ſhall be indicted, tried, or attainted of high treaſon, 7 W. 3. c. 3. ſ. 2. 4.

(ſuch

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(ſuch as have already been ſtated,) or of miſpriſion of ſuch treaſon, but by and upon the oaths and teſtimony of two lawful witneſſes, either both of them to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon; unleſs the party indicted and arraigned or tried ſhall willingly without violence in open court confeſs the ſame; or ſhall ſtand mute, or refuſe to plead; or in caſes of high treaſon ſhall peremptorily challenge above 35." And it further enacts and declares, "that if two or more diſtinct treaſons of divers heads or kinds ſhall be alleged in one bill of indictment, one witneſs produced to prove one of the ſaid treaſons, and another witneſs to another of the ſaid treaſons, ſhall not be deemed to be two witneſſes to the ſame treaſon within the meaning of the act."

Ante, f. 43.

f. 3. *Vide* poſt, f. 69.

There is alſo a proviſo, "that any perſon being indicted as aforeſaid for any of the ſaid treaſons or miſpriſions may be outlawed, and thereby attainted; and in caſes of the high treaſons aforeſaid, where by the law after ſuch outlawry the party outlawed may come in and be tried, he ſhall upon ſuch trial have the benefit of this act."

§ 64. *Two witneſſes to what treaſons, and before whom.* *Vide* 3 Inſt. 25. & 1 Hale, 298—300. Poſt. 232.

The firſt point to be noted upon theſe acts is the neceſſity of two witneſſes to prove the treaſon; which extends as well to the finding of the bill of indictment by the grand jury as to the trial itſelf in open court; not only as in law and reaſon they ſtand on the ſame footing, but by the very words of all the acts, that no perſon ſhall be *indicted*, &c.

Poſt 233, &c. 1 MS. Sum. 64, 5. K. l. 18. 49. 1 Hale, 298. 316. Sum. 262. *Sed vide* 3 Inſt. 26.

At common law, one witneſs was ſufficient in caſe of treaſon as well as on any other capital charge. The ſtat. 1 Ed. 6. c. 12. firſt required that in caſes of treaſon there ſhould be two witneſſes. This was followed by the ſtat. 5 & 6 Ed. 6. c. 11. to the ſame purpoſe. Little regard however was had to theſe ſtatutes in the times next ſucceeding the paſſing of them, upon an idea entertained and acted upon by ſome, that they were repealed by the ſtat. 1 & 2 Ph. & M. c. 10. which reſtored the common law trial to all treaſons. But it has been long ſettled, that the true object and operation of this laſt act, which was intended for the benefit of the ſubject, and not to deprive him of any advantage which he then enjoyed, was not to repeal the above ſtatutes of Ed. 6., but to reſtore the common law right of trial in the proper county, and the peremptory challenge of 35, which had been intrenched

(*Vide* 3 St. Tr. 56. 415. 645. 733.)

trenched upon by ſeveral acts in the reign of Henry the 8th. In this reſpect therefore the act of 7 W. 3. is only confirmatory of the law as it ſtood before.

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The ſtatutes of Ed. 6. I have already obſerved extended to all treaſons; but the ſtat. 1 & 2 Ph. & M. c. 11. by an expreſs proviſion excepts perſons accuſed of any of the offences contained therein, or of any other offence concerning "the impairing, counterfeiting, or forging of any coin current within the realm." It was agreed by all the Judges, that this act extends to all offences touching the impairing the coin, which ſhall be made treaſon afterwards; and therefore it was agreed, that one witneſs was ſufficient in clipping as well as counterfeiting the coin; though it appears that the opinion and practice had once been otherwiſe in the caſe of clipping. The ſtat. 7 W. 3., which only extends to treaſons working corruption of blood, does alſo expreſsly exclude the counterfeiting of the king's coin, great ſeal, privy ſeal, ſign manual, and privy ſignet: all theſe may be indicted and tried in ſuch manner, and by ſuch evidence, as before theſe ſeveral acts were made. The ſame proviſion is continued by the ſtat. 8 & 9 W. 3. c. 26. ſ. 7. and 6 Geo. 3. c. 53. ſ. 3.

[32 H. 8. c. 4. 33 H. 8. c. 20. & c. 23.]

T. Jones, 233. *Vide* 1 Hale, 221. ex Relatione Holt C. J. MS. Tracy, 262. *Vide* poſt, offences relating to the coin, tit. Witneſſes.

Ante, p. 106, 7. Gahagan's caſe, O. B. 1748, Leach, 39. Hale, 221.

Vide poſt.

It alſo appears to be the intent of the ſtat. 40 Geo. 3. c. 93. that where the overt act of treaſon alleged ſhall be the aſſaſſination or killing of the king, or any direct attempt againſt his life, or againſt his perſon whereby his life may be endangered, or his perſon may ſuffer bodily harm, proof by one witneſs ſhall be ſufficient; becauſe it enacts, that the party may be "indicted and tried in every reſpect and upon the like evidence, as if he ſtood charged with murder." And yet the ſtatute proceeds to negative ſpecially, that any of the proviſions in the acts of the 7 W. 3. and 7 Ann., touching the trial of treaſons, ſhould extend to the caſes above mentioned; whereas it appears that the neceſſity of two witneſſes in caſes of treaſon ſtands upon other acts beſides the two ſpecifically referred to.

40 Geo. 3 c. 93. *Vide* ante, ſ. 43.

§ 65. *Two witneſſes to what facts.*

It was fully eſtabliſhed by the opinion of all the Judges on the trial of Lord Stafford, as it ſeems to have been before underſtood in the caſe of the regicides, that one witneſs to one overt act, and another to another overt act of the ſame ſpecies of treaſon, were two ſufficient witneſſes within the ſtatutes of Edward 6. From that time the rule has prevailed. The ſtat. 7 W. 3. does not require that each overt act ſhall

Caſe of the Regicides, Kel. 9. Lord Stafford's caſe, 7 St. Tr. 204, 5. T. Ray. 407. Foſt. 235. 237. 1 Ms. Sum. 66. Burnet's MS. 13. Parkyn's caſe, 4 St. Tr. 548. Ante, ſ. 57.

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be proved by two witneſſes, but only that the treaſon ſhall be ſo proved. And, by the expreſs direction of that ſtatute, either two witneſſes to the ſame overt act, or one witneſs to one and another witneſs to another overt act of the ſame treaſon, that is of the ſame ſpecies of treaſon, are ſufficient. But, if ſeveral overt acts be proved by different witneſſes ſingly, ſuch overt acts muſt relate to the ſame kind of treaſon, otherwiſe it is inſufficient by the expreſs proviſion of the ſtatute 7 W. 3. c. 3. which in this reſpect is only declaratory of what was the known rule of law before.

Ante, f. 64.

Overt acts in different counties. Ante, f. 61. 2 MS. Sum. 485. Deacon's caſe, Foſt. 9, 10. *Vide* Parkyn's caſe, 4 St. Tr. 639, 640.

In Deacon's caſe in 1746, it was expreſsly ruled by Abney and Foſter Juſtices, that after proof of ſome overt act charged within the county in which the indictment is laid, evidence may be given of other acts of treaſon tending to prove the overt acts laid, though done in a foreign county. And evidence of that ſort was given in almoſt all the trials for high treaſon at the ſame period. The like was done in moſt of the trials after the rebellion in 1715. But further, if one overt act be proved by one witneſs in the county in which the trial is had, which gives the grand jury juriſdiction to inquire, another overt act of the ſame ſpecies of treaſon proved by another witneſs in a different county will make two witneſſes within the ſtat. 7 W. 3. This was expreſsly ruled in the caſe of Layer: and was ſo adjudged at York by Ld. C. B. Parker and the Judges Burnet, Clarke, and Denniſon in the caſe of Jellias in 1746. Ld. C. J. North laid down the ſame doctrine in Gavan's caſe before the ſtat. of King William.

Layer's caſe, 6 St. Tr. 314. 319. 322. 2 MS. Sum. 485.

Rex v. Jellias, Oct. 1746, MS. Burnet, 13, 14.

Gavan's caſe, 2 St. Tr. 873.

Collateral facts. Foſt. 240, 2. 1 MS. Sum. 66. Vaughan's caſe, 5 St. Tr. 38. & Salk. 634.

But though the treaſon itſelf muſt be proved by two witneſſes in the manner above ſpecified; yet a collateral fact, not tending to the proof of the overt acts, may be proved by one witneſs only. As in the caſe of Captain Vaughan, where the priſoner having called witneſſes to prove that he was born in France, the counſel for the crown produced witneſſes to prove that he was born in Ireland; and the priſoner inſiſting that there was but one credible witneſs to that fact, Lord Holt ſaid that one witneſs was ſufficient; for the ſtatute of William relates only to the proof of the treaſon, and the overt acts of that treaſon; and the ſtatutes of Edward 6. are confined to the evidence for proving the priſoner guilty of the offence; which muſt alſo be underſtood of the overt acts. The ſame doctrine was holden in the caſe of Smith, upon an indictment for adhering to the queen's enemies on the high ſeas. He made alienage his

Rex v. Smith, alias May, Admiralty Seſſions, June, 7 Ann. Foſt. 242.

defence; and his confeſſion, that he was an Engliſhman born, was holden admiſſible by the judges Trevor, Powell, Powis, Tracy, and Bury; though his counſel inſiſted on the act of the 7 W. 3., which the court ſaid was intended to prevent a confeſſion being concluſive evidence of the very overt act, but not to take away that ſort of evidence of collateral matters.

Ch. II. § 65. *Indictment. Witneſſes.*

Confeſſion.

§ 66. *Confeſſion.* 1 MS. Sum. 66. Foſt. 240, &c.

The ſtat. 7 W. 3. requiring two witneſſes to prove the treaſon has this exception, "unleſs the priſoner ſhall willingly and without violence, in open court, confeſs the ſame." The ſtatutes of Edward 6. make the ſame ſort of exception, but with this difference, that the words "in open court," are in thoſe ſtatutes omitted; as well as ſome further variation in the wording of the latter act of Edward 6., which I ſhall preſently have occaſion to remark. It appears that till the caſe of Francia in 1716, the conſtruction upon the ſtatutes of Edward 6. had been, that to warrant a conviction it was not neceſſary that the confeſſion ſhould be made in court, but it was ſufficient if it were made before any magiſtrate or perſon having authority, as a privy counſellor, to take ſuch examination; and were afterwards proved at the trial by two witneſſes, without any further proof of the overt acts. Lord Coke indeed ſeems to conſider that the exception is confined to an examination out of court, upon the conſtruction of the words "*without violence*," as meaning without any torture; and therefore, ſays he, by "confeſſion without violence" is not meant of a confeſſion before the judge; for he is never preſent at any torture; neither upon the priſoner's arraignment was ever any torture offered. This appears to be a very extraordinary conſtruction; more eſpecially as it is directly repugnant to the expreſs words of the auxiliary ſtat. of 5 & 6 Ed. 6. which are, that the two witneſſes ſhall, "at the time of the arraignment of the party accuſed," be brought before him to prove the treaſon, "unleſs *the ſaid party arraigned* ſhall willingly without violence confeſs the ſame." If indeed no other violence than the rack (the uſe of which was very unfrequent and always illegal) had ever been made uſe of to draw confeſſions from priſoners, there might be leſs reaſon for doubting this conſtruc-

Vide the caſe of Tong and others, 1662. 1 Hale, 304. Kel. 18, 19. 2 And. 67.

3 Inſt. 25. *Vide* Foſt. 241.

Vide Foſt. 244. a.

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tion of the act, though the latter words would ſtill be repugnant to ſuch a conſtruction: but when we find ſo late as in 14 Car. 2. the advice of all the judges, which I preſume was found neceſſary to be given, that *no promiſe* ſhould be made, or *any threatnings* uſed, to the *witneſſes*, in caſe they did not give *full evidence* againſt the priſoners, we need not be ſurprized at the care of the legiſlature at all times both before and ſince to hinder any undue advantage being taken of the ſituation of a priſoner to wring a confeſſion from him; of which I fear the hiſtory of former times can furniſh but too many examples. The ſame words are to be found in the ſtatute of William, where it cannot be ſuppoſed that the legiſlature could allude to the torture. If the matter had undergone no further diſcuſſion, I ſhould have had but little heſitation in collecting the ſenſe of the legiſlature in theſe ſeveral acts of parliament. The words of the ſtat. 1 Ed. 6. might beget ſome doubt from their generality, in what manner the confeſſion intended to be excepted was to be made, and by what proof it was to be ſuſtained. This was meant to be cleared up by the ſtat. 5 & 6 Ed. 6. which followed ſo cloſe upon it, and which ſeems to me to have defined what confeſſion was intended to be excepted; namely, a confeſſion *at the time of the arraignment by the ſaid party arraigned* (*a*). Was it then intended to exclude evidence of any other confeſſion? In my apprehenſion, neither the words nor the obvious meaning of theſe acts have any ſuch tendency. For the rule, out of which the exception is taken, is the neceſſity of proving the treaſon by two witneſſes: the thing excepted is a confeſſion; which confeſſion therefore was not required to be proved by two witneſſes. No ſort of confeſſion could, conſiſtently with the principle of thoſe acts, be ſo intended to be excepted, but a confeſſion, as the ſtatute of William in plain terms expreſſes it, a confeſſion *in open court*, ſuch as required no proof by witneſſes; which I conceive was expreſſed as plainly before by the ſtat. of the 5 & 6 Ed. 6. All other proof then of the treaſon was required to be confirmed by two witneſſes, except a proof in open court by the confeſſion

Tong's caſe, Kel. 17, 18.

Vide 1 Hale, 314.

(*a*) So the ſtat. 1 & 2 Ph. & M. c. 10. ſ. 9. required that at leaſt two witneſſes examined to any treaſons in that act ſhall be brought forth before the party *arraigned*, if he require the ſame, and ſay openly in his hearing what they can ſay againſt him concerning the treaſons in the indictment, unleſs the party *arraigned* ſhall *willingly confeſs* the ſame *upon his arraignment*.

of

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of the party; which of itſelf was ſufficient to warrant his conviction and attainder. There are no negative words in any of the ſtatutes, declaring that no evidence of any other confeſſion ſhall be received; but all other proof of the treaſon, including a confeſſion out of open court, muſt be made by two witneſſes. The queſtion then is ſimply this, Whether evidence of the confeſſion of the priſoner of any fact be or be not legal proof of the truth and exiſtence of ſuch fact? which I preſume cannot be denied. I am aware that the above reaſoning carries the admiſſion of this ſort of evidence beyond the rule which I before alluded to; and that it lets in as well evidence of confeſſion at any time, or upon any occaſion, as confeſſion upon an examination before a magiſtrate or other perſon having authority to take ſuch examination. I ſtop not to inquire what degree of weight is due to bare evidence of a confeſſion out of court, unſupported by any other proof of the fact; for that is foreign to the preſent inquiry: but I ſee nothing upon the face of theſe acts of parliament to warrant the diſtinction aimed at. I ſubmit the above reaſons with great deference to better judgments. But the concluſion which I have drawn has higher authority to ſupport it: for at a conference of the judges, preparatory to the trial of Francis Francia in 1716, it was agreed that the confeſſion, which the ſtatutes of Edward 6. intended to except, was only a confeſſion upon the arraignment of the party, which amounts to a conviction: and that the deſign of thoſe acts was merely to prevent any other confeſſion from operating as a concluſive and abſolute conviction: but that in all caſes the confeſſion of a criminal may be given in evidence againſt him; and that in caſes of treaſon, if ſuch confeſſion be proved by two witneſſes, it is proper evidence to be left to

Vide Kel. 18.

Ante, p. 131.

Francia's caſe, 1 MS. Sum. 67. Foſt. 11. Burnet's MS. accord. This caſe is alſo alluded to in Foſt 241 but the reſolution there is not ſo fully reported as in the MS. (*a*).

(*a*) The report of this caſe in the MS. of Mr. Juſtice Burnet is in theſe words: "It was reſolved by the judges that though a confeſſion before a magiſtrate does "not take away the neceſſity of two witneſſes, as it did by the 5 & 6 of Ed. 6. "c. 11.; yet the ſtat. of 7 W. 3. c. 3. which requires two witneſſes [unleſs "there be a confeſſion, which amounts to a conviction, as a confeſſion in open "court does] has not altered the nature of evidence. That therefore a witneſs "to a confeſſion before a magiſtrate, or a witneſs to a confeſſion in converſation, "is a witneſs within both theſe acts. And if two ſuch witneſſes are produced, "and the grand and petty jury believe them, they are two ſufficient witneſſes to "indict and convict the party of the overt acts confeſſed to two ſuch witneſſes." Francia's caſe, 1719, MS. Report. "To this he adds, that the caſe of Rex "v. Berwick, at the court of St. Margaret's, Southwark, Auguſt 1746, was "ſo ruled by the judges."

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a jury (*a*). By this conſtruction the ſtatute of William has not added any new reſtriction with reſpect to confeſſions, than was before implied in the ſtatutes of Edward 6.; and conſequently if confeſſions out of court might under thoſe ſtatutes be given in evidence, if proved by two witneſſes, the ſame kind of evidence is admiſſible now. But from Mr. Juſtice Foſter's manner of ſtating the opinion of the judges above referred to, and obſerving upon it, we may collect that he was not well ſatisfied with it. He ſays, that no regard was paid to the former authorities: and he alſo adverts to the caſe of Smith before mentioned; and to that of Willis, where it was admitted on the part of the proſecution, that a confeſſion out of court, though admiſſible in evidence, was not of itſelf ſufficient to ground a conviction: and where Ward, C. B. afterwards ſaid, that there muſt be two witneſſes to the treaſon notwithſtanding a confeſſion. Upon the whole it ſeems to have been the inclination of Mr. Juſtice Foſter's own opinion, that a confeſſion out of court would not warrant a conviction ſince the ſtatute of W. 3.; that that ſtatute, by the inſertion of the words "*in open court*," was intended to carry the neceſſity of two witneſſes to the overt acts a ſtep further than the ſtatutes of Edward 6. were at firſt conſtrued to have carried it; and that the intention of the legiſlature was to require two witneſſes to the overt acts themſelves in all caſes, except where the priſoner confeſſed the treaſon upon his arraignment in open court; and therefore that by that ſtatute no other confeſſion, though proved by two witneſſes, was ſufficient to convict the priſoner: the exception extending to a virtual excluſion of all other evidence of confeſſion, as a ſufficient ground at leaſt for conviction in itſelf. But the rule was certainly laid down otherwiſe in Francia's caſe before mentioned. And at a meeting of the judges upon Greg's caſe, which is cited in that of Francia, Holt, C. J. and the judges Powell, Powis, Smith, Dormer, and Bury were clearly of opinion, that the priſoner's confeſſion, though not made in court, might be given in evidence within the ſtat. 7 W. 3. Trevor was of a contrary opinion; Tracy doubted; and the Chief Baron, Blencowe, and Gould, Js. were abſent. On the trial of the rebels in the North in the

1 MS. Sum. 67—70.

Ante, f. 65. Willis's caſe, 8 St. Tr. 254, 5. 262, 3.

Ante, p. 113. Greg's caſe, 1 MS. Supra, 69. MS. Tracy, 262.

Q. of Price, B.

Caſe of Rebels in 1746, MS. ſupra.

(*a*) The ſame appears to have been the opinion of Lord Hale, 1 Hale, 306. and *vide* Kel. 18. in the caſe of the Regicides.

ſummer

ſummer of 1746, the judges in that commiſſion admitted the confeſſion of the priſoners to be given in evidence againſt them upon proof by two witneſſes. And in the caſe of John Berwick, at St. Margaret's Hill in the ſame year, Lord C. J. Willes and Sir Thomas Abney purſued the ſame doctrine, and over-ruled Mr. J. Foſter. In that caſe, however, other circumſtances were proved againſt the priſoner; ſuch as his appearing in the priſon where the rebel officers were confined apart from the common men after the ſurrender of Carliſle, and giving in his name as ſuch an officer to the perſons appointed to take the account; which facts were conſidered by the learned judges not merely as a bare confeſſion after the fact, but as evidence ariſing from the very ſcene of action. Finally, Mr. Juſtice Foſter himſelf ſays, that perhaps it may now be too late to controvert the authority of the opinion in 1716, warranted as it has been by later precedents; but he inſiſts that this evidence of confeſſion ſhould never be carried further than to a confeſſion made with ſolemnity and deliberation, before a perſon who has a proper authority to take it; which was an ingredient in the caſes of Francia and Greg. I have before ſubmitted ſome reaſons why I think ſuch a diſtinction cannot be ſupported. Thoſe advanced by Mr. Juſtice Foſter in ſupport of it, however well worthy of attention in point of the weight which ought to be given to this ſpecies of evidence, are yet general in their nature, and equally applicable to confeſſions in all other criminal caſes as in this of high treaſon. The reſolution of the judges in Francia's caſe is not confined to examinations before magiſtrates, but comprehends in the very terms of it confeſſions of every kind. The opinion of the two judges in Berwick's caſe, is, as far as it goes, againſt the diſtinction; not to mention the caſes of the rebels on the trials in the North in 1746, which from the nature of thoſe caſes were as little likely to be governed by it.

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Berwick's caſe, 1746, MS. ſupra, & Foſt. 10. 41.

Foſt. 243.

Standing Mute.

§ 67. *Mute.*

In all caſes of high treaſon ſtanding mute amounts to a conviction: and this is now extended to all caſes of felony and piracy by ſtat. 12 Geo. 3. c. 20.: and perſons ſtanding mute are excepted out of the benefits of trial conferred by the 7 W. 3. c. 3.

1 Hale, 228. 2 Hale, 317. 7 W. 3. c. 3. ſ. 2.

Clergy.

§ 68. *Clergy.* 25 Ed. 3. ſt. 3. c. 4. Poſt. 190, 1.

Concerning the puniſhment of traitors, the ſtatute de clero provides, that "clerks convicted for any treaſons or felonies, touching other perſons than the king himſelf or his royal majeſty, ſhall have the privilege of holy church." By force of this reſervation all new created treaſons, which in judgment of law are levelled at the perſon or royal majeſty of the king, are excluded, without ſpecial words for that purpoſe. Of this kind are the treaſons created by ſtatutes made for eſtabliſhing the regal ſupremacy, for avoiding doubts touching the ſucceſſion of the crown, and for eſtabliſhing ſuch ſucceſſion; for the puniſhing ſeditious and defamatory libels tending to raiſe ſuſpicions touching the king's title or government, or the royal iſſue. For all theſe have a direct tendency to diſturb the peace of the kingdom, and endanger the ſtability of the government; and, therefore, by a juſt, reaſonable, and neceſſary conſtruction, come within the above deſcription. But with reſpect to treaſons of a lower kind, ſuch as petty treaſon, or any other terminating in injuries to particular perſons, the rule is otherwiſe; and clergy can only be taken away by expreſs words.

Outlawry.

§ 69. *Outlawry.* 5 & 6 Ed. 6. c. 11. ſ. 7.

By ſtat. 5 & 6 Ed. 6. c. 11. ſ. 7. "All proceſs of outlawry againſt any offenders in treaſon, being reſiant or inhabitant out of this realm, or in parts beyond the ſea, at the time of the outlawry pronounced againſt them, ſhall be as effectual in law to all intents and purpoſes, as if ſuch offenders had been reſident and dwelling within this realm at the time of ſuch proceſs awarded and outlawry pronounced. Provided (ſ. 8.) that if the party outlawed ſhall, within one year next after the ſaid outlawry pronounced or judgment given thereon, yield himſelf to the chief juſtice of England, and offer to traverſe the indictment or appeal whereon the ſaid outlawry ſhall be pronounced, then he ſhall be received to the ſaid traverſe; and being thereupon found not guilty by verdict, ſhall be acquitted and diſcharged of the ſaid outlawry, as though it had not been made." One outlawed, and retaken in England, was, notwithſtanding his being in cuſtody, allowed to be within the benefit of

Johnſon's caſe, M. 2 Geo. 2. B. R. *vide* 6 St. Tr. 983. n.

of this proviſo; and, upon proving himſelf to have been beyond ſea at the time of the outlawry, it was reverſed, and he was admitted to a trial, and acquitted; and Armſtrong's caſe, which had been otherwiſe ruled by the odious advice of Lord C. J. Jefferies, was declared an unfit precedent to be followed. Ch. II. § 69. *Outlawry.* Armſtrong's caſe, 3 St. Tr. 983. 3 Mod. 47

The ſtat. 7 W. 3. c. 3. ſ. 3. ſaves the benefit of the regulations thereby enacted on trials for treaſon to ſuch as, having been outlawed, do afterwards entitle themſelves to a trial on the merits.

Judgment.

§ 70. *Judgment.*

The judgment in high treaſon for a man in all caſes, except counterfeiting the coin, is to be drawn upon a hurdle to the place of execution, there to be hanged by the neck; to be cut down while he is alive, and his entrails taken out and burnt before his face; and his head to be cut off, and body quartered; and the head and quarters to be at the king's diſpoſal. 1 MS. Sum. 89. 2 MS. Sum. 586. 590. MS. Tracy, 281. 1 Hale, 187. 350, 1. 2 Hale, 396. 3 Inſt. 210. Sum. 268.

Foſt. 336. 2 Hawk. ch. 48. ſ. 3. 4 Blac. Com. 92. Walcott's caſe, 4 Mod. 395.

In the entry of the judgment in treaſon it is only ſaid, that he ſhall be drawn to the place of execution, without adding "upon a hurdle," though it ought to be ſo pronounced: and thus it was pronounced by Holt, C. J. in the caſe of James Boucher, 27th February, 2. Ann. In the ſame caſe he alſo pronounced the judgment, that his privy members ſhould be cut off: this ought alſo to be omitted in the entry of the judgment: and both theſe things were omitted in the entry of the judgment againſt Boucher, by the opinion of all the judges of England. And Holt, C. J. there produced the records of the judgments againſt Somerville and Arden in the time of Queen Elizabeth, and againſt Sir Walter Raleigh, which accorded therewith. And he ſaid, that thoſe words, that the privy members ſhould be cut off, were not in any records that he had ſeen but thoſe in the caſe of the regicides. Nor indeed are they uſually pronounced. Boucher's caſe, MS. Tracy, 295. See Tucker's caſe, 4 Mod. 162. Show. C. P. 186. (1 And. 106.) *Vide* the judgment in the caſe of Ld. Derwentwater and others, 6 St. Tr. 16.

For women the judgment was always the ſame in all caſes of treaſon, whether high or petty treaſon, namely, to be drawn to the place of execution and there burnt alive: but that is now *Women.* Authorities ut ſupra.

Ch. II. § 70. *Women.*

now altered to being drawn and hanged, by the ſtatute 30 Geo. 3. c. 48. ſ. 1.; and by ſ. 4. the like forfeitures and corruption of blood ſhall enſue as before the act. And by ſ. 2. women convicted as principals or acceſſaries before in petty treaſon ſhall be liable to the further puniſhment inflicted by the ſtat. 25 Geo. 2. c. 37. on perſons convicted of murder.

30 Geo. 3. c. 48.

Vide tit. Homicide (Judgment.)

Coin.

1 MS. Sum. 45.
2 MS. Sum. 589.
MS. Burnet, 19.
1 Hale, 219, 220. 224. 351.
2 Hale, 397.
Sum. 45.
2 Hawk. ch. 48. ſ. 4, 5, 6.

In all caſes of treaſon reſpecting the coin, whether newly created ſuch or not, and ſo in petty treaſon, the judgment is only to be drawn on a hurdle and hanged; for that was the judgment before the ſtatute 25 Ed. 3. ſt. 5. c. 2., and was not intended to be altered thereby: and theſe being all offences in pari materiâ, and auxiliary to the original law, have the ſame judgment. And ſuch it ſeems was formerly the judgment for counterfeiting the great or privy ſeal; but now that is the ſame as in other treaſons.

Ante, ſ. 24.

2 Hale, 239. 354. 359, &c.
4 Blac. Com. 380, &c.

The conſequences of a judgment and the attainder conſequent thereon in treaſon, are, 1. Corruption of blood to the party attaint; by which he can neither inherit nor tranſmit lands by deſcent to his heirs. 2. Loſs of dower to his wife. 3. Forfeiture (*a*) to the king of all his lands, goods, and chattels: and this relates back to the time of the treaſon committed. 4. Execution. Without attainder, there is no forfeiture of lands, unleſs, ſays Lord Hale, where the Chief Juſtice of B. R. as ſupreme coroner, in perſon upon the view of the body of one killed in open rebellion records it, and returns the record into his own court; when both lands and goods are forfeited.

2 Hale, 342.

By the ſtat. 7 Ann. c. 21. it was provided, that after the deceaſe of the then pretender no attainder for treaſon ſhould extend to the diſheriſon of any heir, nor to the prejudice of any other perſon than the traitor himſelf for his life. The operation of that proviſion was by ſtat. 17 Geo. 2. c. 39. ſ. 3. further ſuſpended till the death of the pretender's ſons. But the proviſion never took effect, and is now wholly repealed by the act of the 39 Geo. 3. c. 93.

(*a*) *Vide* Chapter of Crimes (Felony, Forfeiture) for the general deſcription of property liable to forfeiture.

CHAP. III.

MISPRISION OF TREASON.

Definition.

A Knowledge and Concealment of Treaſon, without Participation or Conſent. § 1. Knowledge to what Extent neceſſary; Diſcloſure, what is ſufficient. - - - § 1.

Trial and Puniſhment. - - § 2.

MISPRISION of treaſon is where a perſon knowing of a treaſon, but no party or conſenter to it, does not reveal it by a fair and full diſcloſure in convenient time to the king, or his privy council, or to ſome magiſtrate or perſon having authority to take the examination. And it is doubtful whether a declaration to any other than theſe is ſufficient. Such a concealment or keeping ſecret of any high treaſon ſhall, by the ſtat. 1 & 2 Ph. & M. c. 10. ſ. 8. and other prior ſtatutes, be now taken to be only a miſpriſion, though formerly it was deemed evidence of an aiding and abetting to the treaſon itſelf. But ſtill, under particular circumſtances, ſuch as I have before noticed, concealment may amount to evidence of aſſent to the treaſon, and ſo make the party a principal traitor.

§ 1.
Definition.
1 Hale, 214-371, 3.
Sum. 127.
3 MS. Sum. 188.
3 Inſt. 24.
Kel. 17. 21, 22.
4 Blac. Com. 120.
1 Hawk. ch. 20.
1 & 2 Ph. & M. c. 10. ſ. 8.
Vide 1 Ed. 6. c. 12. ſ. 19.
1 & 2 Ph. & M. c. 10. ſ. 8.
1 Ed. 6. c. 12. ſ. 20.
5 & 6 Ed. 6. c. 11. ſ. 11.
Ante, ſ. 7.

The knowledge muſt be of the perſon of the offender as well as of the deſign or offence: for a man cannot be ſaid to conceal that which he does not know. Therefore if one ſay to *J. S.* that there will be a riſing, but do not acquaint him with the perſons or the nature of the plot, the concealing of this

Knowledge, to what Extent.
3 MS. Sum. 188.
1 Hale, 372.
Kel. 21.
MS. Tracy, 127.

is

Ch. III. § 1. *Definition.*

is not miſpriſion. On the other hand, if the party have an explicit knowledge of an intended riſing, his merely telling another in a general way that there will be a riſing will not acquit him of miſpriſion.

Vide authorities at the beginning.

By neceſſary conſtruction of the ſtat. 25 Ed. 3. ſt. 5. c. 2. there can be no miſpriſion of any other treaſon than what is declared and enacted therein, (which includes petty treaſon,) unleſs created by ſome ſubſequent ſtatute in force. But if a new ſtatute create a new treaſon, it virtually and conſequentially makes the concealing thereof miſpriſion of treaſon. There are however ſome offences, made poſitive miſpriſions of treaſon by particular ſtatutes, which are noted in their proper places.

§ 2. *Trial and Puniſhment.*

Staunf. 37.
1 Hale, 374.
4 Blac. Com. 119.
2 Hawk. ch. 20.
Poſt. tit. Crimes, (Merger.)
3 Inſt. 24.
1 Hale, 300.
Ante, c. 2. ſ. 64.
2 Inſt. 49.
1 Hale, 374.

All treaſon, it is ſaid, includes miſpriſion of treaſon and more; and therefore that the king may indict a traitor for the miſpriſion only. And the trial, ſays Lord Hale, may be in a foreign county, under the circumſtances ſpecially provided for by the ſtat. 33 H. 8. c. 23., which in that reſpect is not repealed by the ſtat. 1 & 2 Ph. & M. c. 10. Two witneſſes however are neceſſary by the ſtatutes 1 Ed. 6. c. 12. ſ. 22. and 7 W. 3. c. 3. before referred to, both upon the indictment and trial of miſpriſion of treaſon, except in the caſes I have there noticed. For this offence a peer ſhall be tried by his peers, upon indictment found by a grand jury.

Puniſhment.

1 Hale, 374, 5.
4 Blac Com. 120.
Sum. 128.

The puniſhment for miſpriſion of high treaſon is the loſs of the profits of lands during life, forfeiture of goods, and impriſonment during life: but miſpriſion of petty treaſon is only puniſhable by fine and impriſonment, as in caſe of miſpriſion of felony.

CHAP. IV.

OF OFFENCES RELATING TO THE COIN AND TO BULLION.

Introduction relative to the Coin. - § 1.

1. *Definition of "the King's Money or Coin."*

It conſiſts properly of Gold and Silver only. The relative Proportions of Allay. Introduction of Copper Coin. *ib.*

2. *The Legitimation and current Value of Coin.* § 2.

Regulated by the Prerogative. Currency continues till recalled by Proclamation. Diſuſe Evidence of recall. *ib.*

Evidence of Legitimation. - § 3.

What the King's Coin a Queſtion of Fact, proved by Uſage and Notoriety. Proclamation where neceſſary. Where it may be preſumed from Time and Uſage. *ib.* What Species of Currency within the Statutes. *ib.*

Touching the Coin of Ireland and other foreign Members of the Crown. - - § 4.

1. *The counterfeiting and impairing of it.*

The counterfeiting, clipping, or impairing thereof High Treaſon. So the clipping, &c. foreign Coins current within the Realm or Dominions thereof. *ib.*

2. *Concerning the Importation of counterfeit Coin of Ireland, &c. into the Realm.* - - § 5.

Semble Treaſon. *ib.*

3. *Importing falſe Money into Ireland, &c.* § 6.

If from foreign Parts Treaſon. Aliter the importing it from one Part of the King's Dominions to another. *ib.* To make Treaſon, the counterfeiting muſt

muſt be of Money current within the Realm. Felony if not current. - - § 6.

Diviſion of Offences relating to the Coin. § 7.

I. *Counterfeiting the Coin.* - § 8.

1. *What Coin.* - - § 8.

Deſcription of the ſeveral Species of Coin, the counterfeiting whereof is puniſhable, and in what Degree. *ib.*

i. *Gold and Silver Coin of the King.*

Counterfeiting thereof Treaſon by ſtat. 25 Ed. 3. ſt. 5. c. 2. 8 & 9 W. 3. c. 26. and 15 Geo. 2. c. 28. *ib.* Pardon on diſcovering others. *ib.* Trial and Evidence. *ib.* Limitation of Proſecution. *ib.* Seizure of baſe Coin. *ib.*

The Statutes confined to ſuch Coin. - § 9.

ii. *Gold and Silver foreign Coin.* - § 10.

Counterfeiting thereof, when current, Treaſon by 1 Mar. ſt. 2. c. 6. When not current, Miſpriſion of Treaſon by 14 Eliz. c. 3. and Felony by 37 Geo. 3. c. 126. ſ. 2. *ib.* Miſdemeanor at Common Law. *ib.* Procurers within the 1 Mar. ſt. 2. c. 6. and 14 Eliz. c. 3. but not mentioned in 37 Geo. 3. c. 126. *ib.*

iii. *Copper Coin of the Realm.* - § 11.

Counterfeiting thereof formerly a Miſdemeanor by 15 Geo. 2. c. 28. Now Felony by 11 Geo. 3. c. 40. as to Halfpence and Farthings; and by 37 Geo 3. c. 126. ſ. 1. extended to other Copper Money current by Proclamation. *ib.* Extend to Counſellors, Aiders, and Procurers. *ib.* Power to ſeize the Counterfeits. *ib.* Quære, as to Proſecutions on 37 Geo. 3. c. 126. whether optional for Felony or Miſdemeanor? *ib.*

2. *How the Offence of counterfeiting may be committed.* § 12.

i. By an actual Imitation of the real Coin; not merely an Attempt to do ſo: except by particular Statutes. *ib.* (and poſt, ſ. 13.)

ii. Under

ii. Under particular ſtatutes. Under 8 & 9 W. 3. c. 26. By marking the Edges of Coin with Letters, &c. By gilding, ſilvering, or caſing over with any Waſh, &c. baſe Coin, or round Blanks, &c.; or gilding Silver Blanks to reſemble Gold Coin. Under 15 Geo. 2. c. 28. by making Shillings or Sixpences reſemble Guineas or Half Guineas, or making Halfpence or Farthings reſemble Shillings or Sixpences. - - - § 12.

The Similitude of the counterfeit to the real Coin a Queſtion of Fact; it need not be perfect: ſufficient if it be ſuch againſt which common Prudence cannot guard. - § 13.

What *a Colouring* within the Statutes. § 14.

Preparing Blanks with ſuch Materials as when rubbed will reſemble the real Coin. *ib.* Bringing to the Surface the latent Silver in a Blank of mixed Metal, by means of Aqua Fortis. *ib.*

3. *By whom the Offences may be committed.* § 15.

By Officers of the Mint as well as others. *ib.* Indictment on 8 & 9 W. 3. c. 26. muſt negative that Defendant was employed in the Mint, ſuch Perſons being excepted in enacting Clauſe. *ib.*

II. *Making, mending, or having any Inſtrument, &c. applicable to counterfeiting the Coin.* - - - § 16.

Offences of this Sort made High Treaſon by Stat. 8 & 9 W. 3. c. 26. ſ. 1. *ib.* So by ſ. 2. conveying ſuch Tools, &c. out of the Mint. Extends to Aiders and Abettors, and to Receivers and Concealers of ſuch Tools, &c. *ib.* Tools, &c. to be ſeized and produced in Evidence. *ib.* Proſecution within ſix Months, by 7 Ann. c. 25. ſ. 2. *ib.*

A Preſs or Mould for coining is a Tool or Inſtrument within the Statute of William. § 17.

How to be deſcribed in the Indictment. *ib.* & § 18.

What a ſufficient Excuſe for having ſuch in Poſſeſſion. - - - § 17.

Reſemblance to a common Purpoſe of the Inſtrument to the Coin ſufficient. - § 18.

Having knowingly in Poſſeſſion a Puncheon for coining, is within the 8 & 9 W. 3.; though that alone without the counter Puncheon not ſufficient to make the Figure, &c. *ib.* And though it be without the proper Letters. *ib.* How to be deſcribed in the Indictment. *ib.* Not neceſſary to prove actual coining with it. § 18.

Indictment for Miſdemeanor at Common Law for having Tools for coining in poſſeſſion with Intent to uſe them. - - § 19.

III. *Impairing the Coin.* - - § 20.

Statutes relating thereto; 17 Ed. 4. c. 1. 13 & 14 Car. 2. c. 31. 5 Eliz. c. 11. 18 Eliz. c. 1. *ib.* Melting down Coin a Miſdemeanor. *ib.* Clipping, waſhing, rounding, or filing, or by any Means whatever impairing, &c., falſifying, ſcaling, or lightning the current Coin, High Treaſon. *ib.* Extends to Acceſſaries before. *ib.* Impairing Iriſh Coin within the Statutes. *ib.* The Act muſt be done for Lucre. *ib.*

By 6 & 7 W. 3. c. 17. having in poſſeſſion the Clippings, or Filings of current Coin, a Miſdemeanor. *ib.* So by Stat. de Monetâ. *ib.*

IV. *Importing counterfeit or light Coin into the Realm.* - - - § 21.

1. *Counterfeit Coin.*

Counterfeited to the Likeneſs of the King's Money, High Treaſon by Stat. 25 Ed. 3. ſt. 5. c. 2. Counterfeiting foreign Coin current, Treaſon by 1 & 2 Ph. & M. c. 11. *ib.* Extends to Procurers, Aiders, and Abettors. *ib.* Quære, as to counterfeiting the King's Coin beyond Sea by a Subject. *ib.*

What *Money* is within the Statutes. What *Similitude* to the real Coin required. From what Place it muſt be brought. By whom. With what Intent. - - § 22.

Importing counterfeit foreign Gold or Silver Coin not current, with Intent to utter it within the Realm,

Realm, or any of its Dominions; Felony, Tranſportation; by 37 Geo. 3. c. 126. ſ. 3. § 23.

2. *Light Silver Money of this Realm.* - § 24.

Exceeding 5l. ſubject to Seizure and Condemnation on Importation. *ib.*

V. *Exporting Counterfeit Coin, &c. from hence to the Britiſh Colonies in America or the Weſt Indies.* - - - § 25.

Subject to Forfeiture by Stat. 38 Geo. 3. c. 67. So exporting any foreign Copper Coin. *ib.* But genuine Money may be exported to Ireland. *ib.*

VI. *Receiving, uttering, or tendering Counterfeit Coin.* - - § 26.

An Agreement to receive and vend before the counterfeiting, Treaſon in caſe of Gold or Silver Money: acceſſary before the Fact to Felony in caſe of Copper Coin. *ib.* Such Agreement after the counterfeiting, but with Knowledge, is a receiving and comforting the Principal. *ib.* Venting, without ſuch Agreement, a Miſdemeanor at Common Law. *ib.* With Knowledge of the Principal, may be Miſpriſion of Treaſon. *ib.*

Receiving, paying, or putting off counterfeit milled Money at a lower Rate than it imports, Felony by Stat. 8 & 9 W. 3. c. 26. § 27. Confined to Gold and Silver Coin of the Realm. *ib.* Extended to Copper Coin by Stat. 11 Geo. 3. c. 40. *ib.* What *a putting off.* ib. What is *diminiſhed* Money within the Stat. of William. *ib.* Form of Indictment. *ib.* What is milled Money. *ib.* Not neceſſary to prove the counterfeit *milled.* ib. Puniſhment. *ib.*

Uttering or tendering in Payment falſe Money knowingly, Miſdemeanor by Stat. 15 Geo. 2. c. 28. Further Puniſhment if Party have other falſe Money at the Time, or utter again within ten Days. For ſecond enhanced Offence, Felony without Clergy. Confined to Gold and Silver Coin. - - § 28.

How Indictment to be drawn on 3d ſect. of the Statute, where two Utterings. It muſt aver the Fact, but need not conclude that Defendant is a common Utterer, &c. - §29.

Uttering or tendering baſe foreign Gold or Silver Coin, not current, Miſdemeanor for firſt and ſecond Offence, Felony without Clergy for third Offence, by Stat. 37 Geo. 3. c. 126. Having in Poſſeſſion more than five Pieces of foreign baſe Gold or Silver Coin of any Kind, liable to Seizure and Forfeiture. - §30.

VII. *As to general Matters relating to the Coin.* - - - §31.

Principal and Acceſſary. *ib.* Indictment and Evidence. *ib.* What is Commencement of Proſecution within a limited Time. *ib.* One Witneſs ſufficient. *ib.* Challenges thirty-five. *ib.* Reward and Pardon. *ib.* Seizure of baſe Coin, and Tools for coining. *ib.* Production of ſuch in Evidence. *ib.*

Regulations and Offences relating to Bullion.

1. *What it is.*

Bullion is Gold and Silver in the Maſs. §32.

Of what Standard. *ib.* Statutes relating thereto, 28 Ed. 1. ſt. 3. c. 20. 17 Ed. 4. c. 1. 8 W. 3. c. 8. 6 Geo. 1. c. 11. allowing two different Standards for Silver Wares, with reſpective Marks. 12 Geo. 2. c. 26. dealers exempt from Proſecution on Diſcovery of the Makers. *ib.* Selling or exporting Gold or Silver Wares without proper Marks. *ib.* 24 Geo. 3. c. 53. requiring a Mark for the Duty. *ib.* 30 Geo. 3. c. 31. making Exceptions. 38 Geo. 3. c. 69. allowing a lower Standard for Gold Manufacturers, with a particular Mark. - §32.

Reſult of all the Statute Standards and Marks. §33.

Offences and Puniſhments. - §34.

2. *Counterfeiting Bullion.* - - §35.

Blanching Copper for Sale, or mixing it with Silver,

ver, or buying, ſelling, or offering to Sale ſuch, or the like, or any Compoſition like Gold, Felony. - - § 35.

3. *Exportation of Bullion.* - - § 36.
Allowed by Stat. 15 Car. 2. c. 7. Modified by Stat. 6 & 7 W. 3. c. 17. Ingots or Bars made in Imitation of Spaniſh, prohibited. *ib.* Bullion exported muſt be ſtamped. *ib.* Owner muſt diſtinguiſh between Engliſh and foreign. *ib.* By Stat. 7 & 8 W. 3. c. 19. Certificate from the Lord Mayor, &c. of London required before Exportation. - - § 36.

4. *Sale of Bullion.* - - § 37.
Brokers prohibited from buying or ſelling Bullion.

5. *Poſſeſſion of Bullion unaccounted for.* - § 38.
Puniſhable by Stat. 6 & 7 W. 3. c. 17. ſ. 8.

Of Offences relating to the Coin, and to Bullion.

§ 1. *Introduction. As to the coin.*

BEFORE I proceed to conſider of offences relating to the coin, I ſhall give a ſhort introductory account of the coin itſelf, ſo far as it may be uſeful to the preſent purpoſe.

Lord Hale has written ſeveral chapters upon this ſubject, wherein he has traced the hiſtory of the coin with ſufficient certainty at leaſt as far back as the time of Edw. 1ſt. From thence it appears, that the coin or money of this kingdom conſiſts properly of gold or ſilver only, with a certain alloy, conſtituting what is called *ſterling*, coined by the king's authority: and to ſuch money only does the ſtat. 25 Ed. 3. ſt. 5. c. 2. refer, which mentions "*the king's money*" generally. And therefore it ſeems, that where any ſtatute names *money* generally, it muſt be taken to have the ſame meaning. The copper coin, concerning which Lord Hale doubted, has ſince his time been protected from being counterfeited or impaired by ſpecial enactment. According to the above-mentioned ſtandard of ſterling, which had continued with little alteration at leaſt from the time of Hen. 3. to the period in which Lord Hale wrote, one pound of ſterling gold contained 23 carats 3 grains and a half of fine gold and half

1 Hale, chap. 17, 18, 19, & 20. *Vide* poſt. ſ. 27. Cirwan's caſe. Co. Litt. 207. 1 Blac. Com. 278. 4 Blac. Com. 84. 88. 1 Hale, 189. 210, 211. 1 Hawk. ch. 17. ſ. 57. 1 MS. Sum. 91. 2 Inſt. 577. 3 Inſt. 17. 1 Hale, 212.

1 Hale, 189. 190, 1. 203. 209.

Ch. IV. § 1. *Introduction. As to the coin.*

a grain of alloy of copper, making together 24 carats of Troy weight. But for many years paſt the ſtandard has been fixed at 22 carats of fine gold and two carats of copper (*a*). And by the ſame ſtandard, every pound weight of ſterling ſilver muſt contain 11 ounces 2 penny-weights of fine ſilver and 18 penny-weights of copper alloy, making together 12 ounces. By an old ſtatute of the 17 Rich. 2. c. 1. no foreign coins of gold or ſilver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into Engliſh coin. The introduction of copper money into general currency is of comparative late date. Lord Hale refers to a proclamation juſt iſſued at the time he wrote, in 1672, whereby copper halfpence and farthings, ſuch as are now in circulation, were made current in certain caſes. Though indeed he makes mention of proclamation for farthing tokens before that time; which however he ſays were not uſed for current money but merely for tokens. But thoſe who counterfeited them or made inſtruments for that purpoſe were puniſhed in the Star-Chamber.

Vide 12 Geo. 2. ch. 26. poſt. ſ. 32. & 14 G. 3. c. 42. ſ. 2.

17 Ric. 2. c. 1. *Vide* poſt. p. 160.

1 Hale, 197.

1 Hale, 155.

1 Hale, 211.

2 Ruſhw. 202.

§ 2. *Legitimation and current value of coin.*

The coining and legitimation of money, and the giving it its current value, are the unqueſtionable prerogatives of the crown; though great doubt has been entertained whether by force of the ſtat. 25 Ed. 3. c. 13., the 9 H. 5. ſt. 2. c. 6., and other acts ſettling the ſtandard of ſterling, the king is not now reſtrained from altering it by increaſing the alloy. But, at this day it is the leſs neceſſary to conſider the point, becauſe the impolicy of the act is alone ſufficient to prevent the attempt from being made; unleſs the marketable and relative value of gold and ſilver ſhould ſenſibly alter (*b*). Lord Hale, though he upholds the prerogative in this reſpect, ſays however, that it would be a diſhonour to the nation to put it in practice, and not ſafe to be attempted without parliamentary advice. But any coin once legally made and iſſued by the king's authority continues to be the current coin of the kingdom until recalled, notwithſtanding any change in the authority which conſtituted it. This recall may be by

1 Hale, 188. 191, 2, 3. 2 Inſt. 577. 3 Inſt. 17. 93. 1 Blac. Com. 278. 4 Blac. Com. 88.

1 Hale, 122.

(*a*) A pound weight of gold is coined at the Mint into 44 guineas and a half; an ounce therefore is worth 3*l.* 17*s.* 10½*d.* in ſilver. A pound weight of ſtandard ſilver is coined into 62 ſhillings, which is 5*s.* 2*d.* an ounce.—Smith's Wealth of Nations, 1 vol. 62, 3.

(*b*) About the years 1796 and 1797 the marketable value of gold and ſilver fluctuated in a manner unprecedented at leaſt in modern times.

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proclamation; and long diſuſe may, I conceive, be evidence of it. But it has alſo been effected by act of parliament (*a*). Ch. IV. § 2. *Introduction. As to the coin.*

§ 3. *Evidence of legitimate current coin.*

The weight, alloy, impreſſion, and denomination of money made in this kingdom, are regularly ſettled by indenture between the king and the maſter of the mint; which has ſometimes been followed by a proclamation, as a more ſolemn manner of giving it currency. But this in general caſes is certainly not neceſſary; and in proſecutions for coining need not be proved. Neither is it neceſſary in the ſame caſe to produce the indentures, though it may be of uſe in caſe of any new coin, with a new impreſſion, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the ſtamps uſed, or the like evidence. By the act of the 37 Geo. 3. c. 126. ſ. 1. relative to the new copper coinage, the king's proclamation is made neceſſary; and therefore ſeems to be required in proof of any indictment upon that ſtatute. But in general, whether the coin, upon a queſtion of counterfeiting or impairing it, be the king's money, or not, is a mere queſtion of fact, which may be found upon evidence of common uſage or notoriety. But proclamation by the writ of proclamation under the great ſeal, or a remembrance thereof, is neceſſary to prove a coin current in the following inſtances: 1. In the caſe of foreign coin, which is otherwiſe to be conſidered as no more than bullion. None ſuch is now current in this kingdom. Mr. Juſtice Blackſtone intimates an opinion, which remains however to be judicially confirmed, that the currency mentioned and intended by the ſtatutes muſt be ſuch as is general, and extending to all payments. It may however be worthy of conſideration, when that caſe comes in judgment, that if the ſubject be in any caſe compellable by law to accept certain coin in payment upon a legal tender, his caſe is juſt as much within the reaſon of the law againſt counterfeiters, and he is as much entitled to the protection of it, as if the currency of that particular coin extended to all other caſes: Such a practice is equally "in deceit of our lord the king and of his people." And by a parity of reaſon I conceive, that an importation of foreign counterfeit money into this realm, with intent to utter it within the ſame or any of the dominions thereof, would fall within the ſtat. 1 & 2 Ph. & M. c. 11. although it were only

1 Hale, 101. 6, 7, 8. 204. 212, 213. 327. 1 MS. Sum. 46.

1 Hale, 192. 197. 213. 1 MS. Sum. 46.

Vide 17 Ric. 2. c. 1. ante, p. 148.

4 Blac. Com. 89.

25 Ed. 3. ſt. 5. c. 2.

(*a*) *Vide* Stat. 9 W. 3. c. 2. and 6 Geo. 2. c. 26.

Ch. IV. § 3. *Introduction. As to the coin.*

current in ſome part of the dominions and not throughout the realm at large. 2dly, A proclamation under the great ſeal is required to legitimate baſe or mixed coin below the ſtandard of ſterling. 3dly, To enhance the denomination or extrinſic value of a coin already current: as was done upon the enhancing of 20s. and 10s. pieces by K. James I. 4thly, To decry any coin before current: as was done not long ſince in the inſtance of the broad pieces of 25 and 23 ſhillings. The ſtat. 6 Geo. 2. c. 26., which made them payable at the mint and offices of revenue for one year after they were ſo decried, ſpecially provided that the counterfeiting of them during that year ſhould be high treaſon. 5thly, By the late act of the 37 Geo. 3. c. 126. ſ. 1., relative to the new copper coinage, the king's proclamation is made neceſſary, and therefore evidence of it ſeems to be required in proof of any indictment upon that ſtatute. But proclamation, where neceſſary, may be preſumed in length of time; eſpecially when ſupported by continual and approved uſage, which in itſelf affords a preſumption of a legal commencement.

Touching the Coin of Ireland and other foreign Members of the Crown.

§ 4. *Iriſh coin, &c.*

Before I quit this part of the ſubject, I muſt notice another queſtion of great importance and difficulty made in the books, reſpecting the money of Ireland, or any other independent member of the crown of England. I ſhall collect together in this place all that I find, or that occurs to me on the ſubject. It has been conſidered upon high authority that the counterfeiting of Iriſh money is high treaſon, within that branch of the ſtat. 25 Ed. 3. ſt. 5. c. 2. againſt counterfeiting *the king's money*; firſt, becauſe it comes expreſsly within the words of the act, which are of large ſignification. The coining of money is the excluſive prerogative of the crown: the king alone is entitled to the profit of it: it is part of his revenue: and all money coined and iſſued by his authority is *his money*. He may coin money here and iſſue it in Ireland, or coin it in Ireland and iſſue it here; and he is equally defrauded and injured whether his money iſſued there or here be counterfeited. All money coined and iſſued by the king's authority is neceſſarily and legally current through-

1 Hale, 211. 221. 225. 317. 1 MS. Sum. 46. 91.

out

out all the dominions of the crown; unleſs the king ſhall by his proclamation ſpecially direct otherwiſe. And this it may be ſaid is not like a local law, affecting merely the intereſts of the ſubjects of this particular kingdom, which might perhaps require a narrower interpretation adapted to the nature of the ſubject matter, but a matter of general concernment pervading every part of the dominions of the crown of England. But, 2dly, There is another, and in my mind a ſtill ſtronger reaſon for this conſtruction; for it appears that the legiſlature themſelves muſt have ſo conſidered it. By the ſtat. 5 Eliz. c. 11. and 18 Eliz. c. 1. the clipping or impairing of any of the proper monies or coins of *this realm*, or *any the dominions thereof*, is made treaſon. Upon theſe ſtatutes, ſays Lord Hale, though Iriſh coin be not current in England, when of a baſer alloy, yet it is the king's coin; and clipping it in England is treaſon by thoſe acts. And it is not to be ſuppoſed that the parliament would make the clipping of Iriſh coin treaſon, unleſs the counterfeiting thereof were ſuch. This argument it muſt be owned has great weight: and upon another occaſion, which I have elſewhere adverted to, has been carried ſtill further. The force of it is alſo conſiderably ſtrengthened by the proviſions of the ſtat. 1 & 2 Ph. & M. c. 11., to which I ſhall preſently have occaſion to refer more particularly. It is further confirmed by the judgment in the caſe of mixed monies; where money which was coined by the queen for Ireland, and made current there by her proclamation in that country, but which was not current in England, was yet holden to be lawful money of England; and that payment of 100l. ſuch money, made payable in Ireland, was a good diſcharge of a bond conditioned for the payment of 100l. ſterling current and lawful money of England.

5 Eliz. c. 11. ſ. 2. 18 Eliz. c. 1.

1 Hale, 211, 221. 317.

Vide Foſt. 330, &c.

Poſt. p. 154. 156.

Caſe of mixed monies, Davis' Rep. 18. 1 Hale, 193 211.

Yet ſtill there appears this difficulty: if money be coined for the excluſive uſe of Ireland, and only circulated there, and it be different from the coin of England and not current here: or if the king iſſue a proclamation in Ireland legalizing ſome foreign coin there, which is not legalized nor current here, how is a ſubject of England reſident here to take cognizance of theſe acts, ſo as to be legally warned not to counterfeit or clip ſuch coin, unleſs ſuch currency be notified here by a proclamation under the great ſeal of England? In the caſe of money coined and iſſued here by the king's authority, it is true that it is not ſtrictly requiſite in proſecu-

Ante, ſ. 3.

1 Hale, 198. 327.

Ch. IV. § 4. *Introduction. Coin of Ireland, &c.*

tions of this ſort to prove a proclamation giving it currency: yet that is the more regular way; eſpecially in the caſe of new coin iſſued with a new impreſſion, as was lately done in the new copper coinage of pennies, and which was made neceſſary by the expreſs words of the ſtat. 37 Geo. 3. c. 126. ſ. 1. "For how," ſays Lord Hale, "can men reaſonably know at firſt, whether this be the king's coin, without ſome ſuch public notification, where long uſe and cuſtom hath not made it familiarly known to them?" But with reſpect to coin heretofore iſſued and current in England, the ſubject has that kind of evidence which ſupplies the more regular notification by a proclamation, namely, the notoriety of the fact: but no ſuch notoriety exiſts in the inſtances I have put. With reſpect however to the clipping of foreign coin current here, I take it that by the very words of the ſtatutes of Elizabeth there muſt have been a proclamation in this country, legalizing the currency, in order to make the offence high treaſon in a ſubject of England. The ſtat. 5 Eliz. c. 11. makes it high treaſon to clip, &c. "the monies or coins of any other realm allowed and ſuffered to be current within this realm or the dominions thereof, at this preſent, or that hereafter at any time ſhall be the lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, *and by proclamation allowed and ſuffered to be current here.*" The ſtat. 18 Eliz. c. 1., which was made to ſupply ſome omiſſions in the former act, is confined in like manner to "the monies or coins of any other realms *allowed and ſuffered to be current*, at the time of the offence committed, within this realm of England, or any the dominions of the ſame, *by the proclamation of the queen's majeſty*," &c. This I apprehend muſt mean ſuch a proclamation, whereof the ſubjects of either kingdom reſpectively are bound to take cognizance; namely, in this country by a proclamation under the great ſeal of England. But with reſpect to money coined by authority of the crown in Ireland, or elſewhere within the dominions of the crown, perhaps in ſtrictneſs the ſubject may be bound at his peril to take notice of its being the king's money; the very act of counterfeiting implying ſome knowledge of the coin which is counterfeited, more eſpecially if it bear any ſtamp or device, denoting the authority from whence it iſſued. It is clear, that in the caſe of counterfeiting or clipping the king's coin, made and iſſued here,

Ante, ſ. 3. Poſt. ſ. 11.

5 Eliz. c. 11.

18 Eliz. c. 1.

here, the very act itſelf conſtitutes the treaſon; and there is no neceſſity to prove any particular knowledge in the party, that it was the king's coin; but only to ſatisfy the jury of the fact of its being ſo: of which notoriety indeed is one and the moſt general medium of proof; but it may alſo be proved by the officers of the mint or any other who has a knowledge of the fact. And indeed in the caſe of old coin, which has gradually fallen into diſuſe, though ſtill the legal coin of the king, there can be no general notoriety of the fact. There is leſs ground for complaining of hardſhip from want of notice at the preſent day; becauſe the counterfeiting of any gold or ſilver coin, whether of this or any other realm, or whether current or not, is highly illegal; being in no inſtance leſs than miſpriſion of treaſon by the ſtat. 14 Eliz. c. 3., or felony by the ſtat. 37 Geo. 3. c. 126.

§ 5. *Importing counterfeit Iriſh coin into the realm.*

The ſame ſort of queſtions occur upon the other branch of the ſtat. of Ed. 3. concerning the bringing of falſe money into the realm counterfeit to the money of England. Firſt, What is meant by *the money of England?* Is it ſomething different from *the king's money*, or the ſame? It certainly muſt appear ſtrange, if for the reaſons before adverted to the legiſlature intended to make the counterfeiting of any coin, made and iſſued by the king in any of the dominions of the crown, high treaſon, though not the proper coin of England, nor current here, that they ſhould have altered their phraſe in this branch of the ſtatute, concerning the importation, from "the king's money" to "money counterfeit to the money of England:" and from thence it might be argued, that theſe latter words explain the former ones, and ſhew that the money meant by *the king's money*, was *the money of England*; ſuch as in the words of the ſtatute was calculated *to merchandize or make payment with:* in other words, ſuch as was *current* in England, and of which the ſubjects of this country muſt be taken to be cognizant. This conſideration might deſerve ſome weight if the queſtion were new. It is indeed ſaid in general terms in the books, that the importation under the ſtatute of Ed. 3. muſt be of money counterfeit to the ſimilitude of the money of England: but theſe are merely the words of the ſtatute, and not given as an interpretation of them. The queſtion ſtill remains, What is meant *by the money*

Staunf. 3.
3 Inſt. 18.
1 Hale, 227.
1 Hawk. ch. 17. ſ. 65.

Ch. IV. § 5. *Introduction. Coin of Ireland, &c.*

money of England? and whether any thing more was meant than to diſtinguiſh ſuch money from the money of foreign realms? In order to make the law conſiſtent, the conſtruction of the ſtatute of Ed. 3. ought to be, that it is high treaſon to bring into the realm the ſame falſe money, the counterfeiting of which within the realm was before declared to be ſo. In that caſe *by the money of England* muſt be underſtood all ſuch money as is coined and iſſued by the authority of the crown of England; and muſt conſequently include money coined and iſſued by the king in Ireland: and ſuch was the opinion that prevailed in the caſe of mixed monies. If this be not the true conſtruction, for aught I can obſerve, the importing into England ſuch falſe Iriſh coin from any foreign kingdom is only puniſhable as a miſdemeanor at common law, or at moſt as a miſpriſion of treaſon, within the ſtat. 14 Eliz. c. 3.; although by the ſtat. 1 & 2 Ph. & M. c. 11. the importation of counterfeit foreign coin, current within the realm, into the realm or any of the dominions of the ſame, with intent to utter it in either, is made high treaſon. In truth I conceive, that neither the above-mentioned act of the 14 Eliz. nor that of Ph. & Mary, nor any other which treats of money "not the proper coin of this realm," or to that effect, can be underſtood of any other coins than thoſe of foreign powers independent of the crown of England; and which I think are emphatically deſignated by the late act of the 37 Geo. 3. c. 126. ſ. 2.; in which caſe unleſs the money of Ireland come within the deſcription of *the king's money*, and *the money of England*, I know of no ſtatute which will reach even the caſe of counterfeiting ſuch Iriſh money in this country.

Ante, f. 4.

Poſt. f. 23.

§ 6. *Importing falſe money from one part of the king's dominions into another.*

Laſtly it has been conſidered, whether the bringing in of falſe money, counterfeit to the money of England, from Ireland, or other tranſmarine member of the crown of England, into England or other the dominions thereof, be within the prohibition of the ſtat. 25 Ed. 3. ſt. 5. c. 2. againſt bringing falſe money *into this realm*. The only direct reſolution I can find upon the ſubject is that in the year-book 3 H. 7. 10., where it was reſolved, that counterfeit money imported into England out of Ireland was not within the ſtatute, becauſe Ireland was a member of England, governed by its laws, and

Poſt. f. 20.

3 H. 7. 10. Bro. Abr. Treaſon, pl. 19.

money

money was coined there by the authority of the king. The queſtion ſimply was, Whether Ireland at that day was within "this realm?" As to which Lord Hale, ſpeaking in another place of the ſtat. 1 & 2 Ph. & M. c. 11., ſays, that an importation out of Ireland into England is not within the act, becauſe Ireland is within *the dominions of this realm*, though not within *the realm*; evidently conſidering them as the ſame in effect for this purpoſe. And Staunford and Lord Coke, grounding themſelves on the above reſolution in the time of H. 7., expreſsly ſay, that if a man bring counterfeit money from Ireland, it is not within the ſtatute of Edward 3., but that it muſt be money made in a foreign nation, and brought from thence into this realm. Lord Hale however ſpeaks with more doubt upon this part of the ſtat. of Ed. 3.; for, ſays he, although Ireland be within the ſt. 35 H. 8. c. 2, for the trial of treaſons out of the realm; yet it has been holden *upon the obſcure book* of 3 H. 7. 10. that an importation of counterfeit coin from Ireland into England is not treaſon here within the ſtatute; principally becauſe the counterfeiting itſelf is puniſhable by the ſtat. 25 Ed. 3., which is of force in Ireland. The ſame reaſon is adopted by Hawkins. It certainly is not concluſive; becauſe it depended with reſpect to Ireland in later times on the will of a different legiſlature to give it efficacy. And the conſtruction does in truth let in much of the miſchief with reſpect to the ſubjects of this country, which the act was intended to guard againſt. But if we attend to the ſubject matter, and conſider that the intereſt of the crown was principally in view, then moſt, if not all, of the reaſons which were firſt urged to ſhew, that *the king's money* mentioned in the firſt branch of the ſtat. 25 Ed. 3. extended to the money coined and iſſued by his authority in Ireland, will alſo apply to ſhew that the bringing of counterfeit money into Ireland or other part of the dominions of the crown is juſt as much within the reaſon of the law againſt bringing it into the realm: for the prerogative of the crown of England, of which Ireland is a member, is as much invaded, and the revenue of the king as much defrauded, whether the counterfeit money be firſt brought into one part of his dominions or into another; into Ireland, or into England. The conſtruction therefore which has prevailed is certainly in uniſon with the reaſon of the law; though

1 Hale, 155. 225. 317. ante, ch. 2. ſ. 19.

Staunf. 3. 3 Inſt. 18.

1 Hale, 225. & *vide* ib. 317.

1 Hawk. ch. 17, ſ. 67.

Ch. IV. § 6. *Introduction. Importing falſe money, &c.*

though perhaps the words do not obviouſly lead to it. But however doubtful this interpretation might have been at firſt, it ſeems to have been greatly confirmed by other acts of the legiſlature. For by the ſtat. 1 Mar. ſt. 2. c. 6. the counterfeiting of any gold or ſilver coin, not the proper coin of, but current within, the realm by the conſent of the crown, (which conſent muſt be ſignified by proclamation and writ under the great ſeal,) is made high treaſon; and the ſtatute 1 & 2 Ph. & M. c. 11. made in aid thereof, provides, that whoever ſhall bring from parts beyond ſea *into this realm*, or *into any of the dominions of the ſame*, any counterfeit money, *current within this realm* by the conſent of the crown, ſhall be guilty of high treaſon. The ſame argument then which Lord Hale drew from the ſtatutes of Elizabeth in aid of the conſtruction of the firſt branch of the ſtat. 25 Ed. 3. relative to counterfeiting the king's money, may be alſo derived from the ſtat. of Ph. & M. in confirmation of the conſtruction put on the ſecond branch of the ſtat. 25 Ed. 3. relative to the importation of falſe money. For it cannot be ſuppoſed that the legiſlature would have made the bringing of *foreign* counterfeit current money into any of *the dominions of the realm* high treaſon, unleſs the bringing of money into ſuch dominions, counterfeited to the likeneſs of our own coin, had been deemed to have been as high an offence before; this being by far the greater miſchief of the two. And conſonant to the conſtruction put on the ſtat. 25 Ed. 3. the bringing of ſuch counterfeit money out of Ireland into this country is not within the ſtatute. But under both the ſtatutes of Ed. 3. and Ph. & M. the money muſt be brought from ſome foreign place out of the king's dominions. If this conſtruction be admitted, it muſt in reaſon be taken to extend to all the plantations and dominions of England, where the ſame laws are in force, by which the counterfeiter himſelf is puniſhable; which is not the caſe of a counterfeiter of our coin in the dominions of another ſovereign; againſt whom it muſt be admitted that this proviſion was principally levelled. Therefore it ſeems, that if the counterfeiting be within the king's dominions, the importer from thence into England, as ſuch, is only puniſhable as an utterer of counterfeit coin. But further, in order to bring a caſe within the ſtatute of the 1 & 2 Ph. & M., it ſeems by the very words of the act that the importation, whether into England or into any of the dominions

1 Mar. ſt. 2. c. 6.

[1 Hale, 210.] 1 & 2 Ph. & M. c. 11. Poſt. ſ. 20.

Vide 1 Hale, 211. 352, 3. ante, p. 151.

1 Hale, 317. ante, p. 154.

1 Hale, 225. 317. 1 Hawk. ch. 17. ſ. 67. 1 MS. Sum. 94. Burnet's MS. 21.

Vide 1 Hale, 225. *Et qu.* in caſe of a ſubject ſo counterfeiting.

3 Inſt. 18. ante, ſ. 6.

dominions parcels of the crown of England, muſt be of ſuch counterfeit money as is *current within this realm*, i. e. of England, *by the conſent of the crown;* which conſent, as we have ſeen, muſt be ſignified by proclamation under the great ſeal of England: for the legiſlature ſpeaking of the currency alter their phraſe, and do not as in the preceding part extend the deſcription to *the dominions of the realm.* And beſides, in the caſe of foreign coin, how elſe can a ſubject of England take cognizance of its legal currency, ſo as to take warning not to import it under the penalty of the law? Alſo by the ſtat. 14 Eliz. c. 3. even the forging of any foreign coin, not current within this realm, was only miſpriſion of treaſon; a fortiori therefore the importation of ſuch forged coin could not have been conſidered as treaſon itſelf. But now by the ſtat. 37 Geo. 3. c. 126. ſ. 2. as well the counterfeiting as the bringing into the realm foreign coin not current is made felony.

Ante, p. 156.
1 Hale, 210.

14 Eliz. c. 3.

Poſt. f. 23.

Some verbal difference is obſervable in the wording of ſome of the ſtatutes on the ſubject of the coin ſince the Revolution. The ſtat. 8 & 9 W. 3. c. 26. ſpeaks of the gold and ſilver coin "of this kingdom," or "current within this kingdom." The ſtat. 15 Geo. 2. c. 28. in one part expreſſes by name, "guineas and half guineas," "ſhillings and ſixpences," and is conſequently confined to thoſe identical coins. In another part it ſpeaks of counterfeit money generally, the explanation of which has been before given. The ſtat. 11 Geo. 3. c. 40. as to the copper coin, and in the ſtat. 37 Geo. 3. c. 126. ſ. 2. as to gold and ſilver coin, deſcribe each as the coin of "this realm," following the words of the more ancient ſtatutes. No ſtreſs can be laid upon ſuch verbal differences between ſtatutes paſſed in pari materiâ, further than that the conſtruction which the reaſon of the thing points out muſt be ſuch as the words are capable of receiving without violence to their proper or accepted legal ſignification.

Ante, ſ. 1.

To proceed now to the conſideration of

§ 7. *Diviſion of offences relating to the coin.*

Offences relating to the Coin.

Theſe may be conſidered under ſeveral different heads.

1. *As to the Offence of counterfeiting the Coin; with a Deſcription of the ſeveral Species of Coin, the counterfeiting whereof is puniſhable, and in what Degree.*

2. *The*

Ch. IV. § 7. *Diviſion of offences relating to the coin.*

2. *The making, mending, or having any Inſtrument applicable to counterfeiting the ſame.*
3. *Impairing the Coin.*
4. *Importing counterfeit or light Coin into the Realm.*
5. *Exporting the ſame.*
6. *Receiving, uttering, or tendering counterfeit Coin.*
7. *General Matters relating to the Coin.*

I. *Counterfeiting the Coin.*

§ 8. *Counterfeiting what coins.* 1 Hale, 77. 222. 4 Blac. Com. 82, 9.

The counterfeiting of the current coin of the realm is in truth a ſpecies of the crimen falſi or forgery, though ranked by the law of England in the higheſt claſs of offences by reaſon of its affecting the royal majeſty of the crown in a great prerogative of government. The legiſlature have reſpectively made proviſion againſt the counterfeiting of the gold or ſilver coin of this realm, and of any foreign realm, and of our copper coin; upon each of which I ſhall have occaſion to obſerve in its turn.

Statutes. 25 Ed. 3. ſt. 5. c. 2. ante, f. 1. ante, ch. 2. f. 6. *Gold and ſilver coin of the realm.* 8 & 9 W. 3. c. 26. f. 3. made perpetual by 7 Ann. c. 25. f. 3.

1ſt, The ſtat. 25 Ed. 3. ſt. 5. c. 2. declares it to be high treaſon "if a man counterfeit the king's money."

By ſtat. 8 & 9 W. 3. c. 26. f. 3. made perpetual by ſtat. 7 Ann. c. 25. "If any perſon, (other than the perſons employed in his majeſty's mint or mints, or ſuch as ſhall have authority from the Lords Commiſſioners of the Treaſury or Lord High Treaſurer of England for the time being,) ſhall after the 15th of *May* 1697 mark on the edges of any the current coin of this kingdom; or if any perſon whatſoever ſhall mark on the edges of any the diminiſhed coin of this kingdom, or any counterfeit coin reſembling the coin of this kingdom, with letters, or grainings, or other marks or figures like unto thoſe on the edges of money coined in his majeſty's mint; every ſuch offence ſhall be adjudged high treaſon; and the offenders therein, their counſellors, procurers, aiders, and abettors, being thereof convicted or attainted, ſhall ſuffer death," &c. The proſecution to be commenced in ſix months after the offence, by ſtat. 7 Ann. c. 25. f. 2.

Colouring or gilding, &c. baſe coin.

By f. 4. of the ſame ſtatute of William, "if any perſon whatſoever after the 15th of May 1697 ſhall colour (*a*), gild, or caſe over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling any the current coin of this kingdom, or any round blanks

(*a*) *Vide* poſt. f. 14. what is a colouring.

Ch. IV. § 8. *Counterfeiting the coin.*

blanks of baſe metal, or of coarſe gold or coarſe ſilver, of a fit ſize or figure to be coined into counterfeit milled money, reſembling any the gold or ſilver coin of this kingdom; or ſhall gild over any ſilver blanks of a fit ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom; all ſuch offenders, their counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon, and being convicted or attainted thereof, ſhall ſuffer death," &c. But without corruption of blood. Proſecutions to be commenced within three months after the offence committed, by ſ. 9.

15 G. 2. c. 28. By ſtat. 15 Geo. 2. c. 28. ſ. 1. "If any perſon ſhall after the 29th September 1742 waſh, gild, or colour any of the lawful ſilver coin called a ſhilling, or a ſixpence, or any counterfeit or falſe ſhilling or ſixpence, or add to or alter the impreſſion or any part of the impreſſion of either ſide of ſuch lawful or counterfeit ſhilling or ſixpence, with intent to make ſuch ſhilling or ſixpence reſemble, or look like, or paſs for, a piece of lawful gold coin, called a guinea, or a half guinea reſpectively; or ſhall file or any wiſe alter, waſh, or colour any of the braſs monies called halfpennies or farthings, or add to or alter the impreſſion, or any part of the impreſſion, of either ſide of a halfpenny or farthing, with intent to make ſuch halfpenny or farthing reſemble or look like or paſs for a lawful ſhilling or ſixpence reſpectively; ſuch offenders, their counſellors, aiders, abettors, and procurers ſhall be guilty of high treaſon." But by ſ. 4. the blood ſhall not be corrupted. *No corruption of blood.* And by ſ. 8. the offender ſhall be pardoned in caſe [being out of priſon] he diſcovers two or more offenders of the ſame kind mentioned in the act, ſo as they ſhall be thereof convicted. *Pardon on diſcovering others.* By ſ. 5. offenders ſhall be indicted, arraigned, tried, and convicted by ſuch like evidence and in ſuch manner as other offenders for counterfeiting the coin; with a proviſo that the proſecution be commenced within ſix months after the offence committed. *Trial and evidence.* *Limitation of time.*

8 & 9 W. 3. c. 26. ſ. 5. And by the 5th ſection of the laſt-mentioned act of William, ſpurious money produced on the trial in a court of juſtice ſhall be cut in pieces in open court.

§ 9. *Confined to gold and ſilver coin of the king.* All the abovementioned ſtatutes relate only to the gold and ſilver coin made and iſſued by the king's authority, in the ſenſe I have before ſhewn; the counterfeiting of which by

Ante, ſ. 1. 1 Hawk. ch. 17. ſ. 57. 1 MS. Sum. 91. Ante, ſ. 1. *Vide* Cirwan's caſe, poſt.

Ch. IV. § 9. *Counterfeiting the coin.*

by all of them amounts to high treaſon. The ſtatute of 25 Ed. 3. has always been ſo conſidered; the proviſions of the 8 & 9 W. 3. are only referable to ſuch coinage, and in ſome parts mention gold and ſilver coin by name; and the ſame appears in terms by the ſtat. 15 Geo. 2.

§ 10. *Counterfeiting gold or ſilver foreign coin.*

Ante, f. 4, 5, 6. *Vide* 1 Hale, 210. 215, 216.

2. With regard to foreign coin of gold or ſilver, ſome obſervations upon which I have before made, the counterfeiting of ſuch as is current here was not within the ſtat. 25 Ed. 3., but was made treaſon fot the firſt time by the ſtat. 4 H. 7. c. 18. But that being repealed by the ſtat. 1 Mar. c. 1. the

1 Mar. ſt. 2. c. 6. *Gold and ſilver foreign coin current.*

ſame proviſion was revived by ſtat. 1 Mar. ſt. 2. c. 6., which enacts, that "if any perſon or perſons falſely forge or counterfeit any ſuch kind of coin of gold or ſilver as is not the proper coin of this realm, and is or ſhall be current within this realm by the conſent of the crown, they and their counſellors, procurers, aiders, and abettors, ſhall on conviction be

1 Hale, 210. 310.

adjudged guilty of high treaſon." This conſent muſt be notified under the great ſeal by proclamation, and a writ annexed thereto: for by the ſtat. 17 Rich. 2. c. 1. foreign coin is not to run in payment in England.

14 Eliz. c. 3. *Gold and ſilver foreign coin not current.*

By the ſtat. 14 Eliz. c. 3. "If any perſon falſely forge or counterfeit any kind of coin of gold or ſilver of other realms as is not the proper coin of this realm, nor permitted to be current within this realm; ſuch offence ſhall be adjudged miſpriſion of high treaſon; and the offenders, their procurers, aiders, and abettors, being convict, ſhall be impriſoned, and forfeit ſuch lands, goods, and chattels, as in

1 Hale, 376.

caſe of miſpriſion of treaſon." By "aiders" is meant ſuch as aid in the fact, and not aiders of the offender after the fact. At common law this offence was only puniſhable as a miſdemeanor.

1 Hale, 210. 311. 318.

Both the ſtatute of Mary and that of Eliz. are to be underſtood of the counterfeiting of ſuch foreign coin as is for the moſt part of gold or ſilver. But the ſtat. 37 Geo. 3. c. 126. has now provided another puniſhment for the offence of counterfeiting foreign gold or ſilver coin not current here:

37 G. 3. c. 126. ſ. 2.

that ſtatute reciting, that "whereas the practice of counterfeiting foreign gold and ſilver coin, and the bringing into this realm and uttering within the ſame falſe and counterfeit foreign gold and ſilver coin, and particularly pieces of gold coin commonly called louis d'or, and pieces of ſilver coin commonly

commonly called dollars, has of late greatly increaſed, and it is expedient that proviſion ſhould be made more effectually to prevent the ſame;" enacts, "that if any perſon or perſons ſhall hereafter make, coin, or counterfeit any kind of coin, not the proper coin of this realm, *nor permitted to be current within the ſame*, but reſembling, or made with intent to reſemble or look like, any gold or ſilver coin of any foreign ſtate, &c. or to paſs as ſuch foreign coin; ſuch perſon or perſons offending therein ſhall be deemed guilty of felony, and may be tranſported for any term of years not exceeding ſeven." By the words, "not permitted to be current within the realm," muſt be underſtood not permitted to be current by proclamation under the great ſeal.

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Vide ante, ſ. 3. 6.

Procurers, who are named in the ſtatutes 1 Mar. ſt. 2. c. 6. and 14 Eliz. c. 3. are not mentioned in this law; but the offence being made felony attaches to it all the incidents of felony at common law, and conſequently may have acceſſaries. But quære, if they are liable to tranſportation, or to any other puniſhment than is authoriſed by the general act of the 18 Eliz. c. 7. ſ. 2. after mentioned?

Poſt. p. 162.

§ 11. *Copper coin.* 15 G. 2. c. 28.

3. Laſtly, As to the copper coin of this realm, the counterfeiting of which was by the ſtat. 15 Geo. 2. c. 28. ſ. 6. puniſhable as a miſdemeanor by two years' impriſonment, and finding ſureties for two years more; it is now enacted by the ſtat. 11 Geo. 3. c. 40. that "if any perſon after the 24th of June 1771 ſhall make, coin, or counterfeit any of the copper monies of this realm, commonly called an halfpenny or a farthing, ſuch offender, his counſellors, aiders, abettors, and procurers, ſhall be adjudged guilty of felony." But clergy is not taken away. Sect. 3. enables any juſtice of peace, on the oath of one witneſs, that there is juſt cauſe to ſuſpect that one or more perſons have been concerned in ſuch coining, by warrant under his hand to cauſe their dwelling-houſes, outhouſes, &c. or other place belonging to them to be ſearched for tools and implements for ſuch coining; and if they ſhall be found concealed there, or in the cuſtody or poſſeſſion of any perſon whatſoever not employed in his majeſty's mint, or having the ſame by ſome lawful authority, to ſeize ſuch tools and carry them before a juſtice of peace of the place, &c. where ſeized, who ſhall cauſe the ſame to be ſecured and produced in evidence on the trial of

11 G. 3. c. 40.

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the offenders, and afterwards deſtroyed by order of the court, or of ſuch or ſome other juſtice of peace in caſe there be no trial.

37 Geo. 3. c. 126. ſ. 3.

By ſtat. 37 Geo. 3. c. 126. "The proviſions of the two laſt-mentioned ſtatutes, (by name,) and all other acts concerning the copper monies of this realm, called an half-penny and a farthing, or any other copper money of this realm, ſhall extend to all ſuch pieces of copper money as ſhall be coined and iſſued by order of his majeſty, &c. and as ſhall by royal proclamation be ordered to be deemed and taken as current money of this realm, as if ſuch pieces had been particularly mentioned in ſuch acts reſpectively."

It may now be a queſtion, Whether under this latter ſtatute it is not optional to proſecute either for a miſdemeanor, as the offence is made by the ſtat. 15 Geo. 2.; or for a felony, as it is made by that of the 11 Geo. 3., ſince the proviſions of both ſtatutes are extended to the new copper coinage? And yet ſuch an option without varying circumſtances is unuſual, and incongruous with the general rule of law, that the miſdemeanor is merged in the felony.

Rex v. Weſt and others, O. B. Sept. 1780. 1 MS. Sum. 91.

The puniſhment, however, under the act of the 11 Geo. 3. is only a year's impriſonment; which is founded on the general ſtat. of the 18 Eliz. c. 7. ſ. 3.

§ 12. *What a counterfeiting.* 1 Hale, 214. Kel. 33.

1. It is firſt to be ſeen what is a counterfeiting within theſe ſtatutes. There muſt be an actual counterfeiting either by the party himſelf or by thoſe with whom he conſpires: a mere attempt to counterfeit, ſuch as preparing the materials or faſhioning the metal, is not ſufficient, except in thoſe particular inſtances which have been ſo declared by ſtatute.

Ante, ſ. 8.

From the ſeveral ſtatutes before ſet forth it is to be collected, that the offence of high treaſon in counterfeiting our own gold or ſilver coin attaches in the ſeveral inſtances following;

Complete counterfeiting. 25 Ed. 3. ſt. 5. c. 2. poſt. ſ. 13.

1. In a complete counterfeiting of any gold or ſilver coin of the realm; at leaſt to the degree of reſemblance after mentioned.

Marking the edges of coin. 8 & 9 W. 3. c. 26.

2. By marking on the edges of any the current or diminiſhed coin of this kingdom, or counterfeit coin reſembling the coin of this kingdom, with letters or grainings, or other marks or figures, like thoſe on the edges of money coined in his majeſty's mint.

3. By

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3. By colouring, gilding, or caſing over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling the current coin of this kingdom: or,

Gilding or ſilvering coin.

4. Any round blanks of baſe metal, or of coarſe gold, or coarſe ſilver, of a fit ſize or figure to be coined into counterfeit milled money, reſembling the gold or ſilver coin of this kingdom.

Gilding or ſilvering blanks. 8 & 9 W. 3. c. 26.

5. By gilding over any ſilver blanks of a fit ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom.

Gilding ſilver blanks to be made into gold coin. 8 & 9 W. 3. c. 26.

6. By waſhing, gilding, or colouring any lawful or counterfeit ſhilling or ſixpence, or adding to or altering the impreſſion on either ſide, to make it reſemble a guinea or half guinea reſpectively.

Making ſhillings or ſixpences to reſemble guineas or half guineas. 15 G. 2. c. 28.

7. By filing, or any wiſe altering, waſhing, or colouring any halfpence or farthings, or adding to or altering the impreſſion on either ſide, with intent to make them reſemble reſpectively a ſhilling or ſixpence.

Making halfpence or farthings reſemble ſhillings or ſixpences. 15 G. 2. c. 28.

Several of theſe proviſions were in truth ſuperfluous; for they amount after all to a counterfeiting of the coin attempted to be imitated. For example; one who alters a lawful ſhilling, ſo as to make it reſemble a guinea, may with as much truth and propriety be ſaid to have counterfeited a guinea, as if he had actually fabricated the whole piece from the original ſtate of the metal. In like manner, as one who alters the principal ſum of a bond is as much a forger of the bond ſo altered, as if he had written the whole. Theſe are kindred offences. The 3d, 4th, and 5th deſcriptions only ſeem to carry the offence further than the ſtat. 25 Ed. 3. had done: becauſe they conſtitute acts to be high treaſon which are only preparatory to, and in the progreſs of actually counterfeiting the coin.

§ 13. *The ſimilitude a queſtion of fact.*

Whether there be a counterfeiting, or, in the words of ſome of the ſtatutes, a reſembling of the real coin, is a matter of fact of which the jury are to judge upon the evidence before them: in which reſpect there can be no diſtinction between our own and foreign coin. There muſt be a reſemblance, ſuch as may in circulation ordinarily impoſe upon

It need not be perfect. 1 Hale, 178. 184. 211. 215.

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the world; but it is clear, that in order to warrant a conviction the reſemblance need not be perfect. Thus a counterfeiting, with ſome ſmall variation in the inſcription, effigies, or arms, done probably with intent to evade the law, is yet within it; and ſo is the counterfeiting in a different metal, if in appearance it be made to reſemble the true coin.

1 MS. Sum. 50. Ridgeley's caſe, poſt. f. 18.

Rex v. Welſh and another, Hertford Lent Aſſizes 1785, cor. Perryn, B. MS. Gould, J. *It is not neceſſary that there ſhould be an impreſſion on the counterfeit, if it reſemble the common current coin.* Leach, 293. S. C.

Patrick and John Welſh were indicted for counterfeiting a piece of falſe and counterfeit money and coin, *of the likeneſs and ſimilitude of the good, legal, and current coin, money, and ſilver coin of this realm* called a ſhilling, againſt the form of the ſtatute. A ſecond count charged a ſimilar offence in counterfeiting a ſixpence. It appeared that all things neceſſary for coining, with a mould for ſhillings and ſixpences, were found in P. Welſh's houſe, where the other priſoner was at work in coining when he was apprehended: and ſeveral ſhillings and ſixpences which they had coined were found in the room or upon them in a perfect ſtate for circulation, and many had been circulated and paſſed off. The objection made was, that there was no impreſſion on any of theſe coins, and that the offence was not complete till the ſtamp was put upon them, till when they could not be ſaid to reſemble the current coin. But it was over-ruled at the trial, and the caſe went to the jury, who found the priſoner guilty. Judgment was however reſpited to take the opinion of the judges, all of whom thought that the conviction was proper. They ſaid, it was a queſtion of fact, Whether the counterfeit were *of the likeneſs and ſimilitude of the lawful current ſilver coin* called a ſhilling? and the jury having ſo found it, the want of an impreſſion was immaterial; becauſe from the impreſſion being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected. The counterfeit was perfect therefore for circulation, and poſſibly might deceive the more readily from having no appearance of an impreſſion; and in the deception the offence conſiſts. But in Varley's caſe, where the impreſſion of money was forged on an irregular piece of metal, not rounded, without finiſhing it, ſo as not to be in a ſtate to paſs current, the offence was holden to be incomplete, although he had actually attempted to paſs it in that condition.

Eaſter term 1785.

Varley's caſe, 1771, 2 Blac. Rep. 632. 1 MS. Sum. 46. Leach, 71. S. C. & 253. *Vide* Rex v. Harris and Minion, Leach, 126.

But

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But if there be a counterfeiting, ſuch as I have before deſcribed, in fraud of the king, the offence within the reſpective ſtatutes is complete before any uttering or attempt to utter. The uttering is puniſhable in another manner, as will be ſhewn.

3 Inſt. 16. 1 Hale, 215. 228. 1 Hawk. ch. 17. ſ. 55. 4 Blac. Com. 84. 1 MS. Sum. 91. Poſt. ſ. 26, 27, 28.

§ 14. *What a colouring, &c. within the ſtatute.* Ante, ſ. 12.

But beſides the offence of counterfeiting, which requires a ſimilitude to a common intent to the exemplar, the above-mentioned ſtatutes, as I before obſerved, go further in ſome inſtances; and in particular it has been made a queſtion, What is *a colouring*, &c. within the ſtat. 8 & 9 W. 3. c. 26.? Ante, ſ. 8.

Rex v. Wm. Caſe, Lancaſter Spring aſſizes 1795, cor. Heath, J. MS. Buller, J. and MS. Jud. *Preparing blanks with ſuch materials as when rubbed will make them reſemble the real coin, is a colouring within the ſtatute, before the reſemblance has been produced by ſuch friction.*

William Caſe was found guilty on an indictment for traiterouſly colouring with materials producing the colour of ſilver a piece of baſe coin reſembling a ſhilling, againſt the ſtatute. The priſoner was taken in the very act of making counterfeit ſhillings in the ordinary way, by ſteeping round blanks compoſed of braſs and ſilver in aqua fortis. None of them were found in a finiſhed ſtate; but many were taken out of the liquor by thoſe who apprehended the priſoner; and others had been before taken out by himſelf and were dry. Theſe exhibited the appearance of lead, and ſome of them had the impreſſion of a ſhilling, and by rubbing them a little they would perfectly reſemble ſilver coin, and would readily paſs current; but in their then ſtate the jury found, that none would paſs current. The queſtion therefore was, Whether this offence were complete, inaſmuch as the colour of ſilver had not been produced in any of the blanks? The counſel for the crown argued, that if the colour of ſilver had been produced, it would have been high treaſon within the ſtat. 25 Ed. 3.; and that the ſtat. 8 & 9 W. 3. was made to puniſh the inchoate offence, which before was not puniſhable; and that offence was complete by dipping the round blanks in the aqua fortis, by which ſome change of colour had been produced; for that the words, "producing the colour of ſilver," were to be reſtrained to the next antecedent words, "materials," &c. and not to the preceding words "colour," &c. This matter being referred to the judges, there was ſome difference of opinion amongſt them. One judge ſaid, he underſtood the words "colour," &c. to mean producing on the piece of metal the colour of ſilver,

Eaſter term 1795, (abſent Perryn, B. and Buller, J.)

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which was not done here; for, without rubbing, the money coined would not pass: and another observed, that the word in the statute was "*producing*," in the present tense, and not materials *which would produce*. But all the other judges thought the conviction right. They considered, that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered which would in the first instance produce a perfect bright shilling or sixpence.

Rex v. Lavey, and Parker, O. B. Dec. 1776. MS. Gould, J. and MS. Crown Cas. Res. *Bringing to the surface the latent silver in a blank of mixed metal by means of dipping it in aqua fortis, which corrodes the base metal, is a colouring within the statute.* Leach, 140. S.C.

A case under the like circumstances had been before expressly decided by the unanimous opinion of the judges to come within the statute. But there the doubt was not, as in the last instance, upon the necessity of rubbing the blank after it was taken out of the wash, in order to give it the appearance of silver; but whether the legislature did not intend such a colouring only as is altogether produced by some outward application. But they all thought that this process of extracting the latent silver by the power of the wash, from the body to the surface of the blank, was a colouring within the words of the act. They thought besides, that it might be charged as a colouring with silver; for the effect of the aqua fortis is to corrode the base metal, and leave the silver only on the superficies, and so the copper is coloured or cased with silver.

§ 15. *Counterfeiting by officers of the Mint.* 1 Hale, 213. 1 Hawk. ch. 17. s. 55. 3 Inst. 16, 17. 4 Blac. Com. 84. 1 MS. Sum. 91. Ante, s. 3.

Not only all such as counterfeit the king's coin without his authority, but even such as are employed by him in the mint, come within these statutes, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorised and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty of high treason; the act must be wilful, corrupt, and fraudulent; for it must be laid and proved to be done traiterously. The stat. 8 & 9 W. 3. does indeed make a special exception of persons employed in his majesty's mint; which seems unnecessary, and would have been implied

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plied by law, when they were employed by his majeſty's authority in the ſenſe before deſcribed. Nevertheleſs it was holden about Hilary term 13 W. 3. by all the judges, that in an indictment on that act it ought to be averred that the party was not employed in the mint, or authoriſed by the treaſurer, &c.; becauſe the exception of ſuch perſons is within the enacting clauſe; and the want of ſuch an authority is part of the deſcription of the offence itſelf. This queſtion was moved by Mr. Juſtice Turton, who had convicted one upon this ſtatute at York, upon an indictment which had not ſuch an averment; and for this reaſon it was holden bad, and that the priſoner ought to be tried again, which was done at the Lent aſſizes 1702, before Powis, J., when the priſoner was attainted and executed.

MS. Tracy, 19. *Vide* Cro. Cir. Comp 361. 1ſt edit. *Vide* Bell's caſe, Foſt. 430. 3d ed. & 1 Burr. 154. poſt. ſ. 17. 1 MS. Sum. 92.

II. *The making, mending, or having any Inſtrument applicable to counterfeiting the Coin.*

§ 16. *Making, mending, or having inſtruments for coining.* 8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25.

By ſtat. 8 & 9 W. 3. c. 26. ſ. 1. "after the 15th of May 1697, no ſmith, &c. or other perſon whatſoever, (other than the perſons employed in his majeſty's mints in the tower of London or elſewhere, and for the uſe and ſervice of the ſaid mints only, or perſons lawfully authoriſed by the lords commiſſioners of the Treaſury or lord high treaſurer of England for the time being,) ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any puncheon, counter-puncheon, matrix, ſtamp, dye, pattern, or mould, of ſteel, iron, ſilver, or other metal or metals, or of ſpaud, or fine founder's earth or ſand, or of any other materials whatſoever, in or upon which there ſhall be or be made or impreſſed, or which will make or impreſs, the figure, ſtamp, reſemblance, or ſimilitude of both or either of the ſides or flats of any gold or ſilver coin, current within this kingdom; nor ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any edger, or edging tool, inſtrument, or engine, not of common uſe in any trade, but contrived for making (*a*) of money round the edges with letters, grainings, or other marks or figures reſembling thoſe on the edges of money coined in his majeſty's mint; nor any preſs for coinage, nor any cutting engine, for cutting round blanks, by force of a ſcrew, out of flatted bars of gold, ſilver, or other metal; nor ſhall knowingly buy or ſell, hide or conceal, or without lawful authority or

(*a*) *Quære, a miſprint in the printed ſtatute for marking.*

Ch. IV. § 16. *Making, &c. or having inſtruments for coining.*

ſufficient excuſe for that purpoſe, knowingly have in his or their houſes, cuſtody or poſſeſſion, any ſuch puncheon, counter-puncheon, matrix, ſtamp, dye, edger, cutting-engine, or other tool or inſtrument before mentioned. And every ſuch offender and offenders, their counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon, and being thereof convicted or attainted, ſhall ſuffer death," &c.

Conveying out of the mint, or concealing ſuch inſtruments.

By ſ. 2. "If any perſon or perſons whatſoever after the 15th of May 1697, ſhall, without lawful authority for that purpoſe, wittingly or knowingly convey or aſſiſt in conveying out of any of his majeſty's mints any puncheon, counter-puncheon, matrix, dye, ſtamp, edger, cutting-engine, preſs, or other tool, engine, or inſtrument uſed for or about the coining of monies there, or any uſeful part of ſuch tools or inſtruments; ſuch offenders, their counſellors, procurers, aiders, or abettors, as alſo all and every perſon and perſons knowingly receiving, hiding, or concealing the ſame, ſhall be adjudged guilty of high treaſon, and being convicted or attainted thereof ſhall ſuffer death," &c.

7 Ann. c. 25. ſ. 2. *Proſecution within ſix months.*

By 7 Ann. c. 25. ſ. 2. the proſecution of ſuch as offend againſt the above act, "by making, or mending, or beginning or proceeding to make or mend, any coining tool or inſtrument therein prohibited, may be commenced within ſix months after ſuch offence committed."

8 & 9 W. 3. c. 26. ſ. 5. *Coining tools, &c. to be ſeized to be produced as evidence.* Poſt.

Alſo by ſ. 5. of the ſame ſtatute of King William, "If any puncheon, dye, ſtamp, edger, cutting engine, preſs, flaſk, or other tool, inſtrument, or engine uſed or deſigned for coining or counterfeiting gold or ſilver money, or any part of ſuch tool or engine, ſhall be hid or concealed in any place, or found in the houſe, cuſtody, or poſſeſſion of any perſon, not then employed in the coining of money in ſome of his majeſty's mints, nor having the ſame by ſome lawful authority, then any perſon diſcovering the ſame may ſeize and carry them forthwith to ſome juſtice of peace of the county or place, to be produced in evidence at the trial of the offender; and they ſhall be afterwards defaced and deſtroyed by order of the court," &c. By ſ. 7. no attainder by this act ſhall corrupt the blood.

§ 17. *Conſtruction of the ſtatute of William.* Ante, ſ. 15.

As to the manner of drawing the indictment on the ſtatute of William, I have before ſpoken of it.

John

Ch. IV. § 17. *Having, &c. inſtruments for coining.*

John Bell was indicted on the ſtatute, for that he not being a perſon employed in or for the mint, &c. knowingly, felonioufly, and traiterouſly had in his cuſtody a preſs for coinage, without any lawful authority, or ſufficient excuſe for that purpoſe, againſt the duty of his allegiance, &c. It was proved, that the defendant knowingly had a preſs in his houſe and cuſtody, of the ſame ſort as thoſe uſed in the mint for coinage, and proper to be made uſe of for coining guineas, ſhillings, and louis d'ors, or any other ſmaller pieces, and alſo proper for making certain manufactures. It did not appear that it was ever made uſe of or intended to be made uſe of by the defendant for ſuch manufactures, or for coining any of the current coin of this kingdom: but it was proved, that he intended to uſe it for coining louis d'ors and other foreign pieces, not the current coin of this kingdom. And no proof was given by him of his being employed in the mint, &c.; or that he had any lawful authority, or any excuſe but as aforeſaid, for having the ſaid preſs in his cuſtody or poſſeſſion. The defendant was found guilty: but two points were reſerved for the conſideration of the judges; 1. Whether a preſs for coinage be one of the tools or inſtruments within that clauſe of the act on which the indictment is founded? And if it were, 2. Whether the facts ſtated amounted to a ſufficient excuſe, to ſave the defendant from the penalties of the act. A majority of the judges anſwered both queſtions in the affirmative; conſidering on the ſecond queſtion, that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. Lord C. J. Ryder and Foſter, J. diſſented from the laſt reſolution; conſidering that the act, though principally levelled againſt counterfeiters of the current coin of the kingdom, was not confined ſolely to that object. That the intention of the legiſlature was to keep out of private hands, as far as poſſible, all means of counterfeiting the coin; and therefore makes it high treaſon to be knowingly poſſeſſed of ſuch inſtruments, in fact, without lawful authority or ſufficient excuſe. That it was therefore incumbent on the defendant to ſhew ſuch lawful authority or ſufficient excuſe. But that, ſuppoſing his mere intention to be an ingredient in the caſe, the intention found of uſing the preſs for the purpoſe ſtated did not amount to a ſufficient excuſe; and upon the fulleſt conſideration afterwards Mr. Juſtice Foſter was

Bell's caſe, O. B. 1753. Foſt. 430. *A preſs for coinage is a tool or inſtrument within that branch of the ſtat.* 8 & 9 *W.* 3. *c.* 26. *which makes it treaſon to have the ſame knowingly in the party's cuſtody. Having ſuch in poſſeſſion for the purpoſe of coining foreign gold coin not current here, ruled to be a ſufficient excuſe to take the caſe out of the act. Sed dubitatur, et quære.*

On a conference at Serjeant's Inn, 30th June 1755.

Vide the Preface to the 3d edit. of Foſt. C. L. p. 8.

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of opinion that the caſe did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred.

Lennard's caſe, Taunton Lent aſſizes 1772, MS. Cro. Caſ. Reſ. 1 MS. Sum. 93. 2 Blac. 807. & Leach, 85. S. C. *A mould for coining is a tool or inſtrument within the ſtatute* 8 & 9 *W.* 3. *c.* 26. *the unlawful cuſtody of which is treaſon.* Eaſter term 1772, (abſent De Grey, C. J.)

Hugh Lennard was indicted for high treaſon on the ſtat. 8 & 9 W. 3., for having in his cuſtody and poſſeſſion, without any lawful or ſufficient excuſe, one mould made of lead, on which was made and impreſſed the figure, ſtamp, reſemblance, and ſimilitude of one of the ſides or flats of a ſhilling, viz. the head ſide, &c. The priſoner being convicted, it was ſubmitted to the judges, 1ſt, Whether the mould found in the priſoner's cuſtody be compriſed under the general words, "*other tool or inſtrument before mentioned*," ſo as to make the unlawful cuſtody of it high treaſon: it being obſervable that the words, "*pattern or mould*," which are mentioned in the firſt part of the act, are omitted in the latter. 2dly, If it be ſo compriſed, Whether it ſhould not have been laid in the indictment to be *a tool or inſtrument*, in the words of the act? The judges were unanimouſly of opinion, that the mould was a tool or inſtrument, mentioned in the former part of the ſtatute, and therefore included under the general words in the latter part; and that having been before expreſsly mentioned by name, it need not be averred in the indictment to be ſuch tool or inſtrument. Another doubt afterwards aroſe, Whether the indictment properly laid it to be a mould, *on which was made and impreſſed the figure, &c. of a ſhilling?* the evidence being of a mould on which the reſemblance of a ſhilling was inverted, and therefore more properly an inſtrument to make or ſtamp the reſemblance of a ſhilling, than an inſtrument on which the reſemblance was made. Yet the evidence was holden by moſt of the judges to ſupport the indictment; for the ſtamp of the coin was impreſſed on it. But they, as well as the reſt who doubted, agreed that the indictment would have been more accurate if it had ſtated that the priſoner had in his cuſtody a mould that *would make* the figure of one of the ſides of a ſhilling.

A mould on which is impreſſed the reſemblance of a ſhilling inverted is ſufficiently deſcribed in the indictment as "a mould *on which was impreſſed* the figure of a ſhilling;" though it might be more properly deſcribed as a mould *which would make* ſuch figure.

§ 18. *Reſemblance to a common purpoſe of the inſtrument to the coin is ſufficient.* Ante, ſ. 13.

The degree of ſimilitude to the real coin which the tools or inſtruments muſt be capable of impreſſing, in order to bring the caſe within the ſtatute of King William, ſeems to be governed by the ſame conſiderations as were before noticed in regard to the counterfeit coin itſelf. The jury are to judge whether the inſtrument in queſtion be calculated to impreſs the

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the figure, ſtamp, reſemblance, or ſimilitude of the coin current. Theſe latter words extend the offence beyond an exact imitation of the original and proper effigies of the coin: and the intention of the legiſlature would be entirely defeated by a different conſtruction.

Ridgeley's caſe, O. B. Dec. 1778, MS. Gould and Buller, Js. Leach, 172. S. C. *Having knowingly in poſſeſſion a puncheon for the purpoſe of coining is within the ſtat. 8 & 9 W. 3. though that alone, without the counter-puncheon, will not make the figure, &c. And though ſuch puncheon had not the letters, yet held ſufficiently deſcribed in the indictment as a puncheon which would impreſs the reſemblance, &c. of the head ſide of a ſhilling.*

Rowland Ridgeley was indicted, for that he, not being employed by the mint, &c. knowingly, feloniouſly, and traiterouſly had in his cuſtody and poſſeſſion one puncheon made of iron and ſteel, in and upon which was impreſſed and made the figure, reſemblance, and ſimilitude of the head ſide of a ſhilling without lawful authority, &c. He was charged in another count with having ſuch a puncheon, which would make and impreſs the figure, &c. The puncheon was found in the priſoner's lodging, with a quantity of bad money: and the jury were ſatisfied that he had it knowingly, and for the purpoſe of coining, but would have found a verdict only that the puncheon was knowingly in his cuſtody; ſubmitting to the court whether the proof of ſuch puncheon being found ſatisfied the words of the act. The verdict however was taken generally; and as the officers of the mint remembered no proſecution under this branch of the act, the court wiſhed to have the opinion of the judges thereon. It appeared by the evidence of the engraver of the mint, that the puncheon was complete and ready for uſe; and that the manner of making it is this: a ſhilling is cut away to the outline of the head; that outline is fixed upon a piece of ſteel, which is filed or cut cloſe to the outline, which makes the puncheon; the puncheon makes the dye, which is the counter-puncheon. That a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never ſo made at the mint; but after the dye is ſtruck the letters are engraved upon it. That a puncheon alone without the counter-puncheon will not make the figure. That to make an old ſhilling current, nothing elſe was neceſſary but ſuch a puncheon. That the puncheon was hardened and ready for uſe; but it was impoſſible to ſay that the ſhillings found on the priſoner were made with it, the impreſſion was ſo faint, though they had all the appearance of it. The judges were all of opinion that the priſoner's caſe came within the words of the ſtat. 8 & 9 W. 3. The word *puncheon* is expreſsly mentioned in the act; and it will

At Serjeants' Inn, 23 Jan. 1779. (abſent De Grey, C. J.)

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will by the means of the counter-puncheon or matrix impreſs, &c. to the ſimilitude of the current coin. The words "figure, ſtamp, reſemblance, or ſimilitude," in the act, do not mean an exact figure, &c.; but if the inſtrument impreſs a reſemblance in point of fact, ſuch as will impoſe on the world, it is ſufficient, whether the letters are apparent on the puncheon or not; otherwiſe the act would be quite evaded; for the letters would be omitted on purpoſe. The puncheon in queſtion was one to impreſs the head of King William; and the ſhillings of his reign, though the letters were worn out, are current coin of this kingdom. The puncheon made an impreſſion like them, and the coin ſtamped with it would reſemble them on the head ſide, though there were no letters. This was compared to the caſe of counterfeiting the great ſeal mentioned in 1 Hale 184., where he ſays, that the omiſſion or addition of words in the inſcription of the true ſeal, for the purpoſe of evading the law, would not alter the caſe. And the judges all agreed, that it was not neceſſary to prove that money was actually made with the inſtrument in queſtion.

Ante, ch. 2. ſ. 25.

Not neceſſary to prove money made with the inſtrument, &c.

§ 19. Sutton's caſe, Eaſt. 10 G. 2. Rep. temp. Hardw. 370. *Indictment for miſdemeanor at common law for having tools for coining in poſſeſſion, with intent to uſe them.*

In Sutton's caſe, the indictment, which was framed as for a miſdemeanor at common law, charged that the defendant, without any lawful authority, had in his cuſtody and poſſeſſion two iron ſtamps, each of which would make and impreſs the figure, reſemblance, and ſimilitude of one of the ſceptres impreſſed upon the current gold coin of this kingdom, called half guineas, with intent to make the impreſſion of ſceptres on divers pieces of ſilver coin of this realm, called ſixpences, and to colour ſuch pieces of the colour of gold; and fraudulently to utter them to his majeſty's ſubjects as lawful half guineas; againſt the peace, &c. Page, Probyn, and Lee, Juſtices, held, that the bare having ſuch inſtruments in poſſeſſion, with the intent charged, was a miſdemeanor: but Lord Hardwicke thought that the bare poſſeſſion was not unlawful, unleſs made uſe of, or unleſs made criminal by ſtatute, as in the inſtance of the ſtat. 8 & 9 W. 3.

III. *Impairing the Coin.*

§ 20.

This offence ſtands at this day on the following ſtatutes:

Vide 2 Inſt. 577. 17 Ed. 4. c. 1.

By ſtat. 17 Ed. 4. c. 1. No perſon ſhall melt down any money of gold or ſilver ſufficient to run in payment, upon pain of forfeiture of the value: and by ſtat. 13 & 14 Car. 2. c. 31. melting down any current ſilver money of the realm" ſhall be puniſhed with forfeiture of the ſame, and double the value; and if done by a freeman of a town, with diſfranchiſement; if by any other perſon, with ſix months' impriſonment.

13 & 14 Car. 2. c. 31. poſt. f. 32, &c.

5 Eliz. c. 11. *Vide* 1 Hale, 216. 220. 267. 318.

The ſtat. 5 Eliz. c. 11. reciting that the ſtat. 3 Hen. 5. c. 6. concerning clipping, &c. is repealed by ſtat. 1 Mar. ſt. 1. c. 1., and the miſchief that happens thereby; enacts (ſ. 2.) "that clipping, waſhing, rounding, or filing, for wicked lucre or gain's ſake, any of the proper monies or coins of this realm, or the dominions thereof, or of the monies and coins of any other realm, allowed and ſuffered to be current within this realm, or the dominions thereof, or that hereafter at any time ſhall be lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, and by proclamation allowed to be current here, ſhall be adjudged high treaſon; and the offenders, their counſellors, conſenters, and aiders, traitors, being thereof lawfully convicted or attainted." By ſ. 4. there ſhall be no corruption of blood or loſs of dower.

(1 Hale, 327.)

18 Eliz. c. 1.

The auxiliary ſtatute of 18 Eliz. c. 1. declaring that the falſifying, impairing, diminiſhing, or lightning of ſuch laſt mentioned money was not within the ſtat. 5 Eliz. which ought to be taken ſtrictly according to the words thereof, &c. enacts "that if any perſon or perſons ſhall, for wicked lucre or gain's ſake, by any art, ways, or means whatſoever, impair, diminiſh, falſify, ſcale, or lighten the proper monies or coins of this realm, or any the dominions thereof, or the monies or coins of any other realm, allowed to be current at the time of the offence committed within England or any the dominions of the ſame by proclamation, &c.; the offenders, their counſellors, conſenters, and aiders, being lawfully thereof convicted or attainted according to the due order and courſe of the laws, ſhall be adjudged guilty of high

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high treaſon." By ſ. 2. no corruption of blood or loſs of dower ſhall enſue.

1 Hale, 221, 2. MS. Burnet, 19. *Vide* ante, ſ. 4. &c. as to Iriſh coin.

It is clear that the impairing of Iriſh coin, though not current in England, is within the expreſs words of theſe ſtatutes.

1 Hale, 220. 228.

The clipping, &c. muſt be for gain or lucre under theſe ſtatutes, and muſt be ſo laid in the indictment; which muſt alſo purſue the words of the ſtatutes in deſcribing the offence; and conclude againſt the form of the ſtatute, becauſe they were in ſome reſpects introductive of a new law.

6 & 7 W. 3. c. 17.

By the ſtat. 6 & 7 W. 3. c. 17. ſ. 4. "for the better preventing the clipping, diminiſhing, or impairing the current coin of this kingdom, if any perſon ſhall buy or ſell, and (*a*) knowingly have in his cuſtody or poſſeſſion, any clippings or filings of the current coin of this kingdom, he ſhall forfeit the ſame, and alſo 500 l. half to the king and half to the informer; and ſhall alſo be branded in the right cheek with a hot iron with the letter *R*, and be impriſoned till payment of the 500 l. By ſ. 8. of the ſame act, the very poſſeſſion of bullion, under certain circumſtances of ſuſpicion, throws the onus upon the party indicted of proving that it was neither coin nor clippings melted, under pain of impriſonment for ſix months.

(*a*) Qu. *and* for *or* in the printed ſtatute.

3 Inſt. 18.

By the ſtat. De Monetâ, &c. if money falſe or clipped be found in the hands of any that is ſuſpicious, he may be impriſoned until he have found his warrant.

IV. *Importing counterfeit or light Money into the Kingdom.*

§ 21. 25 Ed. 3. ſt. 5. c. 2. *Vide* 1 Hale, 216.

Firſt of counterfeit money. By the ſtat. 25 Ed. 3. ſt. 5. c. 2. "If a man bring falſe money into this realm, counterfeit to the money of England, as the money called Luſhburg, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceit of our ſaid lord the king and his people," it is high treaſon.

1 & 2 Ph. & M. c. 11. *Vide* 1 Hale, 317. ante, ſ. 6.

By ſtat. 1 & 2 Ph. & M. c. 11. it is enacted, "that if any perſon ſhall bring from parts beyond the ſea into this realm, or into any of the dominions of the ſame, any falſe or counterfeit coin or money, being current within this realm as aforeſaid, (viz. gold and ſilver coin of foreign realms current

rent here by the ſufferance and conſent of the crown, which must be by proclamation or by writ under the great ſeal,) knowing the ſame coin or money to be falſe and counterfeit, to the intent to utter or make payment with the ſame within this realm or any the dominions of the ſame, by merchandizing or otherwiſe; ſuch offenders, their counſellors, procurers, aiders, and abettors ſhall on conviction or attainder be deemed traitors."

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Vide 1 Hale, 228.

It is ſaid by Lord Hale, that at common law the counterfeiting (meaning of our own coin) beyond ſea ſeems not to have been ſuch a treaſon as could be tried here, in like manner as adhering to the king's enemies might be; and that therefore the importing was made treaſon by the act of Edward 3. He cites no authority for this poſition, the grounds of which I can find no where ſuggeſted. Certainly however the neceſſity of this branch of the law was no leſs apparent, whether a ſubject of England counterfeiting the king's coin abroad were or were not ameſnable to juſtice; for ſuch counterfeiting might be by a foreigner owing no allegiance to the crown of this realm; and therefore the making this proviſion is of itſelf no argument in ſupport of ſuch an opinion.

1 Hale, 225.

§ 22.

Conſtruction of the ſtatutes.

Ante, ſ. 1. 4, 5. 9. & ante, ſ. 13 18. Ante, ſ. 6.

The counterfeit muſt be brought from foreign parts.

1 Hale, 227, 8, 9. 317. 3 Inſt. 18. Sum. 21. 1 Hawk. ch. 17. ſ. 66. 68.

Vide poſt. ſ. 26.

Confined to the original importer.

It has been ſhewn before what kind of money it is, the bringing in of which is prohibited by theſe ſtatutes; and what ſhall be ſaid to be a ſufficient reſemblance of the counterfeit to the true coin. It has been alſo ſhewn that the money ſo prohibited muſt be brought from ſome foreign place out of the king's dominions into ſome place within the ſame. But further, the acts are confined to the importer, and do not extend to a receiver at ſecond hand; though by force of an ancient ſtatute de monetâ, if falſe money be found upon a ſuſpicious perſon, he may be arreſted till he have found his warrant. And ſuch importer muſt alſo be averred and proved to have known that the money was counterfeit.

It is ſaid by Lord Coke, that the importer muſt alſo merchandize therewith, or make payment thereof: but if he import it with intent ſo to do, it is within the words, and, according to the better opinion, within the intent and true conſtruction of the ſtatutes of Ed. 3. and Philip & Mary; to which purpoſe the latter ſtatute is explanatory of the former.

3 Inſt. 18. 1 Hale, 229. 318. 1 MS. Sum. 50. 94. 1 Hawk. ch. 17. ſ. 69.

For

Ch. IV. § 22. *Importing counterfeit money.*

For though the beſt trial and proof of an intent be by the act done, yet it may alſo be evinced by a variety of circumſtances, of which the jury are to judge. At any rate, ſuch intent muſt be averred in the indictment.

§ 23. *Importing counterfeit gold or ſilver foreign coin, not current.* 37 G. 3. c. 126. ſ. 3. *Vide* the preamble, ante, ſ. 10.

The above conſtruction is confirmed, and a new offence alſo created by the ſtat. 37 Geo. 3. c. 126.; the 3d ſection of which enacts, "that if any perſon or perſons ſhall bring into this realm any ſuch falſe or counterfeit coin as aforeſaid, (i. e. by ſect. 2. "any kind of coin, not the proper coin of this realm, nor permitted to be current within the ſame,") reſembling or made with intent to reſemble or look like any gold or ſilver coin of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin, knowing the ſame to be falſe or counterfeit, to the intent to utter the ſame within this realm, or within any dominions of the ſame; every ſuch perſon ſhall be deemed guilty of felony, and may be tranſported for any term of years not exceeding ſeven."

Several matters are to be remarked in this ſtatute: 1ſt, It embraces the importers of known counterfeit gold or ſilver foreign coin, though *not current* within the realm, who were not included in the ſtat. 1 & 2 Ph. & M. c. 11. 2dly, Acceſſaries before are not mentioned; but theſe are incident to every felony. Yet quære, If they are liable to the puniſhment of tranſportation? 3dly, An importation *with intent to utter* is ſufficient, without any actual uttering; which intent muſt be collected from circumſtances. But though an actual uttering may be the beſt evidence of ſuch intent, yet it ſeems ſafeſt that the indictment ſhould follow the words of the ſtatute. 4thly, The offence created is the bringing ſuch counterfeit money into *this realm*, with intent to utter the ſame *within this realm, or within any dominions of the ſame*; in which reſpect the wording is very different from that of the ſtat. 1 & 2 Ph. & M. c. 11. which prohibits the *bringing into this realm* or *into any of the dominions of the ſame* any counterfeit coin being current *within this realm*. I remark this the rather, becauſe by a ſubſequent ſtatute, viz. 38 Geo. 3. c. 67. the exporting or ſhipping for that purpoſe any ſort of counterfeit coin, whether reſembling our own or any foreign coin, in order to its being ſent to any of our colonies in the Weſt Indies or America, only ſubjects the party to a forfeiture;

Vide ante, p. 161, 162.

Poſt. ſ. 25.

ture; and yet the very fact of such exportation may afford pregnant evidence that it was with intent to utter such base money within those *dominions of this realm*. Nor can it in reason affect the merits of an offender, whether he has collected such base money from the venders of it in this country, or whether he has himself imported it hither, which is necessary to bring him within this clause; his object in exporting it from hence into the British West Indies or America being the same in both instances. But the former case does not seem to be provided for by the stat. 37 Geo. 3.

Ch. IV. § 23. *Importing counterfeit, &c. coin not current.*

§ 24. 14 G. 3. c. 42. made perpetual by 39 G. 3. c. 75.

Another offence is created by the stat. 14 G. 3. c. 42. intitled, an act to prohibit the importation of light silver coin from foreign countries into Great Britain and Ireland. The act recites, that whereas considerable quantities of old silver coin of this realm, or coin purporting to be such, greatly below the standard of the mint in weight, have been lately imported into this kingdom; and that it is expedient to prevent a practice which may be carried on at this time, to the great detriment of the public; enacts, that from the 1st June 1774 all silver coin of this realm, or any money purporting to be such, which is not of the established standard of the mint in weight and fineness, shall be prohibited to be imported or brought into the kingdoms of Great Britain or Ireland from foreign countries; and if any silver coin being, or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, shall be found by any officer of his majesty's customs on board any ship or vessel, in any port, &c. or in any boat or other vessel upon the water within the said kingdoms, or in the custody of any person coming directly from the water side, or from the information of one or more persons in any house or other place, on search there made in the manner directed by the stat. 14 Car. 2. &c., the officer may seize the same; and if upon examination it shall appear to be of the standard weight, it shall be restored, otherwise it shall be seised and confiscated in the manner therein mentioned, and after condemnation melted down.

Ch. IV. § 25. *Exporting counterfeit money.*

V. *Sending counterfeit Coin, &c. out of the Kingdom, for the purpoſe of its being imported into the Britiſh Colonies in America or the Weſt Indies.*

§ 25.

38 G. 3. c. 67. By ſtat. 38 Geo. 3. c. 67. ſ. 1. "All copper coin whatſoever, not being the legal copper coin of this kingdom, and all counterfeit gold or ſilver coin, made to the ſimilitude or reſemblance, or intended to reſemble, any gold or ſilver coin either of this kingdom or of any other country (*a*), which ſhall under any pretence, name, or deſcription whatſoever be exported or ſhipped, or laden or put on board any ſhip, veſſel, or boat, for the purpoſe of being exported from this kingdom to the iſland of Martinique, in the Weſt Indies, or any of his majeſty's iſlands or colonies in the Weſt Indies or America, ſhall be forfeited," &c. And by ſ. 2. "Every perſon who ſhall ſo export, or ſhip, lay or put on board any ſhip, veſſel, or boat, in order to be ſo exported, or cauſe to be ſo ſhipped, &c., or ſhall have in their cuſtody, in order to be ſo exported, any ſuch coin as aforeſaid, ſhall forfeit 200 l. and double the value of ſuch coin, to be recovered by bill, ſuit, action, or information in any court of record at Weſtminſter." But genuine gold or ſilver coin may be exported from hence to Ireland ſince the repeal of the ſtat. 19 H. 7. c. 5. by the ſtat. 20 Geo. 3. c. 18.

Vide 37 G. 3. c. 126. ſ. 6. Ante, ſ. 23.

Exporting genuine money to Ireland. 20 G. 3. c. 18.

VI. *Receiving, uttering, or tendering of counterfeit coin.*

§ 26. *Receiving, uttering, or tendering baſe coin. Treaſon.* 1 Hale, 214. Foſt. 343. *Felony.* MS. Burnet, 40.

Theſe may amount to different degrees of offence according to the circumſtances. If A. counterfeit the gold or ſilver coin current, and by agreement before ſuch counterfeiting B. is to receive and vend the money, he is an aider and abettor to the act itſelf of counterfeiting; and conſequently a principal traitor within the law. In the caſe of the copper coin, he would be an acceſſary before the fact to the felony within the ſtat. 11 Geo. 3. c. 40. And if B. had

(*a*) The genera lcurrens money of the Britiſh Weſt Indies is Spaniſh; which accounts for this branch of the law.

done

done this afterwards for A.'s benefit, without any such agreement precedent to the counterfeiting, but yet knowing the fact; this seems to be the same as a receiving of the principal, because he maintains him. But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor before the stat. 15 Geo. 2. hereafter mentioned. Yet if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treason, and therefore a misprision of the same. In like manner I have before shewn, that the statutes against the importation of false money do not extend to the receivers, not having taken any part in the bringing in of such money.

Ch. IV. § 26. *Receiving, uttering, or tendering base coin.*

Misdemeanor. 1 Hale, 214. 372. 1 MS. Sum. 96. MS. Burnet, 20. Kel. 33 post. f. 28. 1 Hawk. ch. 17. s. 56. & *vide* Post. 342. *Misprision of treason.* Ante, f. 22.

By stat. 8 & 9 W. 3. c. 26. f. 6. "Whoever shall take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import or was coined or counterfeited for, shall be guilty of felony." By f. 7. the corruption of blood is saved; and by f. 9. the prosecution must be commenced within three months after the offence committed.

§ 27. *Receiving, paying, or putting off, &c. felony.* 8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25. f. 3.

This statute mentioning "counterfeit *money*," generally, must it seems be confined to gold or silver coin, in the manner before described. But by stat. 11 Geo. 3. c. 40. f. 2. "If any person after the 24th of June 1771, shall buy, sell, take, receive, pay, or put off any counterfeit copper coin, not melted down or cut in pieces, at or for a lower rate or value than the same by its denomination imports, or was counterfeited for, he shall be adjudged guilty of felony."

Ante, f. 1. 9. post. Cirwan's case, p. 182. 11 G. 3. c 40. *Vide* ante, f. 21.

The putting off under these statutes means an actual passing or getting rid of the money, and not merely an attempt to do so; as by tendering it to another who returns it again, refusing to accept it; which is a distinct offence provided for by the stat. 15 Geo. 2. after-mentioned. In the case of Wooldridge, who was indicted on the stat. 8 & 9 W. 3. c. 26. f. 6. for putting off counterfeit money to a Mrs. Levey, it appeared that he had carried a large quantity of such money to her house, which he had agreed to put off to her, and she to receive from him, at the rate of 29s. for every guinea; and having laid the shillings down on a table,

What a putting off.

Wooldridge's case, Leach, 251. O. B Feb. 1784, cor. Perryn, B. and Gould, J. Sess. Pap. p. 430. S. C.

Ch. IV. § 27. *Receiving, uttering, or tendering baſe coin.*

ſhe was proceeding to count them out at that rate, and had counted out part of the heap when the officers entered the room, and apprehended them, before ſhe could pay the priſoner for thoſe ſhe had ſelected. This was ruled not to be a completion of the offence charged, and the priſoner was acquitted.

It muſt be vented at a lower rate, &c.

The mere venting of the money does not come within theſe acts, unleſs it be done at a lower value than the coin imports; and it ſhould be ſo ſtated in the indictment.

Not is it felony within the ſtat. 8 & 9 W. 3. to put off *diminiſhed money*, by which I underſtand genuine money diminiſhed, if it be not ſtated to be *unlawfully* diminiſhed.

Muſt be charged to be unlawfully *diminiſhed.* Tooke v. Hollingſworth, 5 Term Rep. 217.

Should ſtate to whom put off, &c. MS. Tracy.

At the ſeſſions at the Old Bailey before Michaelmas term 1702, a woman was indicted for putting off ten pieces of counterfeit gilt money like guineas to divers perſons unknown. Holt, C. J. ſaid, that the names of the perſons ought to be mentioned and be laid ſeverally; yet he tried the priſoner and ſhe was convicted. This muſt be governed by the ſame rule as prevails in the caſe of ſtealing the property of perſons unknown.

Vide tit Larceny.

What is milled money, &c. Rex v. Bunning, alias Pendegraſt, O B. Sept. 1794. MS. Jud.

As to what ſhall be conſidered as milled money within the ſtatute of William; James Bunning was indicted for putting off to J. P. nine pieces of falſe and counterfeit *milled* money and coin, each counterfeited to the likeneſs of a piece of legal and current *milled* money and ſilver coin of the realm, called a ſhilling, at a lower rate and value than the ſame did by the denomination import and were counterfeited for; i. e. at ſo much, &c. The fact of knowingly putting off counterfeit ſhillings at a lower value than according to their denomination was fully proved; but it could not be proved that the money had any marks of *milling* upon it. The priſoner being convicted, the objection was referred to the judges, who all held the conviction right. Milled money is ſo called to diſtinguiſh it from hammered money(*a*); and all the money now current is milled, i. e. paſſed through a mill or preſs to make the plate out of which it is cut of a proper thickneſs; though by a vulgar error it is frequently ſuppoſed to mean

To ſupport an indictment for putting off counterfeit MILLED MONEY, *it is not neceſſary to prove that the counterfeit was* MILLED.

Hil. Term 1795.

(*a*) I am informed there has been no hammered money ſince the time of Car. 2. and by ſtat. 9 W. 3. c. 2. the currency of all hammered ſilver coin after January 1697 was prohibited.

the

the marking on the edges, which is properly termed *graining*. The judges therefore thought it unneceſſary that the counterfeit money ſhould appear to have been milled: for conſidering *milled-money* as one word, (as if written with a hyphen,) and deſcriptive of the money now current, if the counterfeit reſemble the money which if genuine would have been milled, it is enough.

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Vide 8 & 9 W. 3. c. 26. ſ. 3.

The like reſolution was made in the caſe of Hannah Dorrington; and alſo in the caſe of Jacobs and Lazarus; which were conſidered by the judges at the ſame time.

Hannah Dorrington's caſe. Caſe of Jacobs and Lazarus, O. B. January 1795, MS. Jud.

The puniſhment under the abovementioned ſtatutes of W. 3. and Geo. 3. is burning in the hand, and impriſonment not exceeding a year; and that under the ſtat. 18 Eliz. c. 7. ſ. 3.

Puniſhment. Rex v. Weſt & others, O. B. Sept. 1780. 1 MS. Sum. 91.

I have before remarked in what views the uttering of baſe money knowingly may be conſidered, according to the circumſtances under which the act is done, and particularly in caſes where it is uttered in concert with the coiner: but as ſuch concert muſt always be difficult of proof, the legiſlature have provided againſt the fact of uttering it knowingly.

Ante, ſ. 26.

§ 28.

Uttering or tendering in payment. 15 G. 2. c. 28.

By ſtat. 15 Geo. 2. c. 28. ſ. 2. "If any perſon ſhall after the 29th of September 1742 utter, or tender in payment any falſe or counterfeit money, knowing the ſame to be ſo, to any perſon or perſons, and ſhall be thereof convicted, he ſhall ſuffer ſix months' impriſonment, and find ſureties for good behaviour for ſix months further; and on conviction for a ſecond offence ſhall ſuffer two years impriſonment, and find ſureties for two years more; and on conviction for a third offence ſhall be adjudged guilty of felony without benefit of clergy."

Further puniſhment if the utterer have other baſe money in poſſeſſion at the time of uttering, or ſhall within 10 days after utter more.

By ſ. 3. "If any perſon ſhall after the ſaid 29th September utter or tender in payment any falſe or counterfeit money, knowing the ſame to be ſo, to any perſon or perſons; and ſhall either the ſame day or within ten days then next utter or tender in payment any more or other falſe or counterfeit money, knowing the ſame to be ſo, to the ſame or any other perſon or perſons; or ſhall at the time of ſuch uttering or tendering have about him in his cuſtody one or more pieces of counterfeit money, beſides what was ſo uttered or tender-

Ch. IV. § 28. *Uttering or tendering baſe coin.*

ed; he ſhall be deemed and taken to be a common utterer of falſe money; and being thereof convicted ſhall ſuffer a year's impriſonment, and find ſureties for his good behaviour for two years more: and for a ſecond offence he ſhall be adjudged guilty of felony without benefit of clergy."

2d enhanced offence, felony without clergy.

Pardon on diſcovery.

By ſ. 4. the corruption of blood is ſaved; and by ſ. 8. any offender out of priſon diſcovering two or more perſons guilty of any of the ſaid offences, ſo as they be thereof convicted, ſhall be pardoned.

Trial and evidence.

By ſ. 5. offenders ſhall be indicted, arraigned, tried, and convicted by ſuch like evidence and in ſuch manner as counterfeiters of the coin; with a proviſo

Limitation of time.

that the proſecution be commenced within ſix months next after the offence committed.

Certificate of former conviction.

By ſ. 9. "If any perſon be convicted of uttering or tendering any falſe or counterfeit money as aforeſaid, and ſhall afterwards be guilty of the like offence in any other county or city, the clerk of the aſſize or clerk of the peace of the county or city where ſuch conviction was had, ſhall, at the requeſt of the proſecutor or any other on his majeſty's behalf, certify the ſame by a tranſcript in a few words, containing the effect and tenor of ſuch conviction, for which certificate 2 s. 6 d. and no more ſhall be paid; and ſuch certificate being produced in court ſhall be ſufficient proof of ſuch former conviction."

Ante, ſ. 1. 9. 27. 1 Hale, 211.

This ſtatute alſo mentioning counterfeit money generally, muſt, as was before obſerved, be confined to the gold and ſilver coin of the realm.

Cirwan's caſe, Oxford Sum. Aſſ. 1794. MS. Jud.

Francis Cirwan was indicted for "unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit;" and this was laid in the one count againſt the form of the ſtatute, and in another generally. The defendant was convicted on the general count, it being admitted at the trial that there was no ſtatute

Hil. Term 1795.

applicable to the fact. But upon reference to all the judges, they held the conviction wrong, it not being an indictable offence.

§ 29. Conſtruction on ſ. 3. of ſtat. 15 G. 2. c. 28.

An indictment againſt Elizabeth Tandy on the act of the 15 Geo. 2. charged her in the firſt count with having on

Eliz. Tandy's caſe, O. B. Jan. 1799. MS. Jud.

the

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the 15th December, 39 Geo. 3. uttered to one George Swinburn a counterfeit half-crown, knowing it to be ſo; and a ſecond count charged her with having on the ſaid 15th December, &c. uttered another counterfeit half crown to the ſame perſon. The priſoner having been convicted on both counts, it was referred by Mr. Juſtice Heath to the judges to conſider what judgment was proper to be paſſed on this record; whether the uttering the counterfeit money twice on the ſame day, being ſtated in two counts, would enable the court to pronounce the greater puniſhment inflicted by the 3d ſection, or whether it were to be reſtrained to the leſſer puniſhment inflicted by the 2d ſection (*a*). In Hilary term 1799 the judges (abſent Eyre, C. J., Buller and Heath, Js.) held, that this indictment was not ſufficient to ſubject the priſoner to the larger penalty, as for uttering two pieces of counterfeit coin on the ſame day; there being no diſtinct averment of that fact. And upon the whole they thought it more adviſeable only to give judgment of impriſonment for ſix months ſingly, and not on each of the counts.

Charging two utterings on the ſame day, each in a different count, will not warrant a judgment on the 3d ſection of the ſtat. 15 G. 2. c. 28. as for two diſtinct utterings on the ſame day, there being no preciſe averment of that fact.

Some doubt was at the ſame time entertained, whether a count charging two ſuch utterings on the ſame day, to bring an offender within the third clauſe, ſhould not conclude with an averment that the offender was a *common utterer of falſe money*, as that clauſe declares him to be. But this doubt was ſhortly after ſolved in the following caſe:

Smith's caſe, coram Buller, J. at Maidſtone Sum. Aſſ. 1799. MS. Buller, J. et alia MS. Jud. *On an indictment on the ſtatute 15 G. 2. c. 28. for uttering falſe money knowingly, and having about him at the time of ſuch uttering other falſe money, the defendant may be adjudged to ſuffer the greater puniſhment of one year's impriſonment, and ſureties for two years more, impoſed by ſection 3.; although there be no averment in the indictment that the defendant was a common utterer of falſe money; for that is a concluſion of law from the facts ſo ſtated.*

James Smith was indicted on the above ſtatute, (15 & 16 G. 2. c. 28.) for that he on, &c. one piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and ſilver coin of this realm, called a half-crown, then and there unlawfully and deceitfully did utter to one J. F., he the ſaid defendant, at the time when he ſo uttered the ſaid piece of falſe and counterfeit money, then and there well knowing the ſame to be falſe and counterfeit. And alſo that he the ſaid defendant at the time when he ſo uttered the ſaid piece, &c. as aforeſaid, to wit, on the ſaid day, &c. had about him in his cuſtody and poſſeſſion one other piece of falſe and counterfeit money, made and counterfeited to the

(*a*) It was obſerved that this form of indictment had prevailed at the O. B. and on the circuits.

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likeneſs, &c. of an half-crown; he the defendant then and there well knowing the ſaid laſt-mentioned piece of falſe and counterfeit money to be falſe and counterfeit, againſt the form of the ſtatute, &c. and againſt the peace, &c. After conviction judgment was reſpited to take the opinion of the judges, whether on this form of indictment the defendant were liable to ſuffer the greater puniſhment inflicted by the 3d ſection of the act, or only the leſſer one provided by the 2d ſection; in other words, whether to bring the caſes within the 3d ſection the indictment ſhould not have concluded with a diſtinct averment, that the defendant was a common utterer of falſe money; or whether that were not the neceſſary concluſion of law from the facts ſtated. In Hilary term 1800 the judges, upon ſearch of precedents for many years back, finding that judgment had been given for the greater puniſhment upon indictments drawn in this form, although ſome were to be found containing the averment in queſtion, held ſuch averment, though it would not hurt, was not neceſſary in order to warrant the greater puniſhment.

Rex v. Levi.

There was at the ſame time another caſe reſerved of a ſimilar conviction againſt Benjamin Levi, on which the ſame judgment was given.

§ 30. *Uttering or tendering foreign baſe coin.* 37 G. 3. c. 126. ſ. 4.

Proviſions of a nature ſimilar to thoſe contained in the ſtat. 15 Geo. 2. c. 28. are now extended to foreign coin by ſtat. 37 Geo. 3. c. 126. ſ. 4. which enacts, "that if any perſon or perſons ſhall after the paſſing of this act utter or tender in payment, or give in exchange, or pay, or put off to any perſon or perſons any ſuch falſe or counterfeit coin as aforeſaid, (i. e. by ſ. 2 & 3. not the proper coin of this kingdom, nor permitted to be current within the ſame,) reſembling, or made with intent to reſemble or look like any gold or ſilver coin of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin, knowing the ſame to be falſe or counterfeit, and ſhall be thereof convicted, every ſuch offender ſhall ſuffer ſix months' impriſonment, and find ſureties for his good behaviour for ſix months more: and if the ſame perſon ſhall afterwards be convicted a ſecond time for the like offence, he ſhall ſuffer two years' impriſonment, and find ſureties for good behaviour for two years more: and if the ſame perſon ſhall afterwards offend a third time, and ſhall

Vide ante, in margine.

1ſt *offence.*

2d *offence.*

3d *offence*

ſhall be convicted of ſuch third offence, he ſhall be adjudged guilty of felony without benefit of clergy."

Ch. IV. § 30. *Uttering or tendering foreign baſe coin.*

By ſ. 5. "If any perſon ſhall be convicted of uttering or tendering any ſuch falſe or counterfeit coin as aforeſaid, and ſhall afterwards be guilty of the like offence in any other county, city, or place, the clerk of aſſize or clerk of the peace for the county, &c. where ſuch former conviction ſhall have been had, ſhall at the requeſt of the proſecutor, or any other on his majeſty's behalf, certify the ſame by a tranſcript in few words, containing the effect and tenor of ſuch conviction, [for which 2s. 6d. and no more ſhall be paid]; and ſuch certificate ſhall be ſufficient proof of ſuch former conviction."

Certificate of former conviction.

By ſ. 6. of the ſame act, "If any perſon or perſons ſhall have in their cuſtody, without lawful excuſe, any greater number than five pieces of falſe or counterfeit coin, of any kind or kinds, reſembling, or made with intent to reſemble or look like, any gold or ſilver coin or coins of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin; every ſuch perſon, being thereof convicted upon oath before one juſtice of the peace, ſhall forfeit all ſuch falſe and counterfeit coin, which ſhall be cut in pieces by order of ſuch juſtice; and ſhall for every ſuch offence forfeit a ſum not exceeding 5 l. nor leſs than 40 s. for every ſuch piece of falſe or counterfeit coin which ſhall be found in the cuſtody of ſuch perſon; one moiety to the informer, the other to the poor of the pariſh where the offence was committed; and in default of payment forthwith ſhall be committed to the common gaol or houſe of correction, there to be kept to hard labour for three calendar months, or until ſuch penalty be paid."

Having in poſſeſſion foreign counterfeit coin.

This laſt ſection includes all counterfeit foreign coin therein deſcribed, whether current here or not.

By ſ. 7. juſtices of peace may grant warrants to ſearch ſuſpected places for foreign counterfeit coin; and ſuch coin, and any implements for making it, when found, may be taken before ſuch juſtices, who ſhall order the ſame to be ſecured for evidence, and to be afterwards deſtroyed.

VII. *As to general Matters relating to the Coin.*

§ 31.

Principal and accessaries.

Ante, c. 2. f. 35.

1 MS. Sum. 99.

1 Hale, 214.

Ante, f. 26.

I have before shewn in what light accomplices or receivers, in all offences concerning the coin amounting to high treason, are considered. In those amounting only to felony, they follow the general rule applicable to felony. A few general instances will suffice. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools or materials for coining.

Indictment and evidence.

Judgment.

Ante, c. 2. f. 53. 70.

In like manner it will be sufficient to refer to what has been before said touching the form of the indictment and evidence applicable thereto, under the general head of high treason; and also touching the judgment, and punishment peculiar to offenders of this sort. The variations in any of these particulars by statute were shewn at the same time that the statutes themselves were set forth.

Commencement of prosecution within time limited.

Rex v. James Willace, Durham Sum. Ass. 1797, afterwards before all the judges, MS. Jud.

Information and proceeding before a magistrate held the commencement of prosecution, and not the preferring the indictment.

Prosecutions under some of the acts referred to are limited to take place within a certain time. Amongst others, the stat. 8 & 9 W. 3. c. 26. f. 9. provides that no prosecution shall be made for any offence against that act, unless such *prosecution be commenced* within three months next after such offence committed. In Willace's case, who was indicted for high treason in colouring a piece of base coin resembling a shilling with materials producing the colour of silver, the evidence was, that on the 5th May 1797 search was made in the prisoner's lodgings in consequence of information; and upon the party's entering the room the prisoner immediately ran away. There was found in his room a quantity of base money such as described in the indictment, some in earlier some in more advanced stages of the process. The prisoner was apprehended the same evening and lodged in Durham gaol. He was afterwards carried before a magistrate, and by warrant dated 8th May was committed to gaol, charged on oath "with suspicion of high treason in *counterfeiting* the current money of this kingdom, viz. shillings," &c. The assizes at Durham were holden on the 8th of August; so that more than three months had elapsed between the commission

of the offence and the preferring of the indictment. But the judges, at a conference, unanimouſly held that the information and proceeding before the magiſtrate was the commencement of the proſecution within the meaning of the act; and that the variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference.

Witneſſes. Ante, c. 2. ſ. 64. 2 Hale, 221. 1 MS. Sum. 50. 93. Foſt. 239. 1 & 2 Ph. & M. c. 11.

Further it has appeared, that in reſpect to traitors of this kind there is not the ſame neceſſity for two witneſſes to prove the treaſon as in the higher ſpecies of that offence; but they may be indicted, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as felons in general; except that they are entitled to a peremptory challenge of thirty-five.

Reward. See tit. Rewards, more at large.

Rewards are given by the ſtatutes 6 & 7 W. 3. c. 17. and 15 Geo. 2. c. 28. on the apprehenſion and conviction of coiners.

See tit. Pardon, at large.

And by the ſame act of King William, ſ. 12. coiners, clippers, &c. are entitled to a pardon on diſcovery and conviction of two other offenders of the ſame deſcription.

Seizure of baſe coin and tools for coining; and production of them in evidence. 9 & 10 W. 3. c. 21. 13 G. 3. c. 71.

It remains only to add, that the legiſlature have made ſpecial proviſion for the ſuppreſſion of baſe coin, and for the production of it in evidence againſt offenders of this deſcription. By ſtat. 9 & 10 W. 3. c. 21. ſ. 1. any perſon to whom any ſilver money; and by ſtat. 13 Geo. 3. c. 71. ſ. 1. any perſon to whom any gold money ſhall be tendered, which ſhall be diminiſhed otherwiſe than by reaſonable wearing, or which from the appearance of it he ſhall ſuſpect to be counterfeited, may cut, break, or deface the ſame: but if the ſame ſhall afterwards appear to have been lawful money, the perſon who cut, &c. ſhall take the ſame at the rate it was coined for: and every queſtion reſpecting the validity of ſuch coin ſhall be finally determined by the chief magiſtrate of the place.

Coining tools, &c. to be ſeized. 8 & 9 W. 3. c. 26 ſ. 5. 11 G. 3. c. 40. 37 G. 3. c 126. Ante, ſ. 11. 16. & 30.

By ſtat. 8 & 9 W. 3. c. 26. and the 11 Geo. 3. c. 40. and the 37 Geo. 3. c. 126. ſ. 7. before mentioned, houſes and other places may be ſearched for tools, which when found, together with all falſe coin, ſhall be ſeized, and produced in evidence againſt the offenders, and afterwards deſtroyed.

Regulations

Regulations and Offences concerning Bullion.

§ 32. *Bullion.* *Vide* 2 Inſt. 577. Plowd. 336.

With regard to bullion, which ſignifies properly either gold or ſilver in the maſs, and is here intended to denote thoſe metals in any ſtate other than that of authenticated coin, the legiſlature for the prevention of frauds both with reſpect to the coin and to plate have made ſeveral proviſions.

28 Ed. 1. ſt. 3. c. 20.

By the ſtat. 28 Ed. 1. ſt. 3. c. 20. no goldſmith ſhall make any veſſel, jewel, or any other thing of gold or ſilver, except it be of good and true allay, viz. gold not worſe than the touch of Paris, and ſilver of ſterling allay or better: and that the latter ſhould be aſſayed by the wardens of the goldſmiths' company, and marked with the leopard's head; and any ſuch made otherwiſe may be ſeized; and if he be attainted of the fact, he ſhall be puniſhed by impriſonment, and ranſom at the king's pleaſure.

Ante, ſ. 1. 17 Ed. 4. c. 1. 2 Hale, 191.

What the ſtandard of ſterling gold or ſilver coin is has been before ſhewn; and by the ſtat. 17 Ed. 4. c. 1. it is provided, that no goldſmith ſhall ſell any gold under the fineneſs of 18 carrats, nor ſilver under the allay of ſterling.

4 H. 7. c. 2. *Vide* 5 H. 4 c. 4. 2 Hale, 644.

By ſtat. 4 H. 7. c. 2. all ſilver fined or parted ſhall be made ſo fine that it may bear 12 penny-weight of allay in a pound weight, and yet be as good or better than ſterling.

18 Eliz. c. 15. *Gold wares 22 carrats; ſilver 11 oz. 2 dwt.*

By ſtat. 18 Eliz. c. 15. goldſmiths' wares are required to be not leſs in fineneſs than 22 carrats of gold, nor of ſilver leſs than 11 ounces 2 penny-weights.

8 W. 3. c. 8. *Standard for ſilver wares 11 oz. 10 dwt.*

By ſtat. 8 W. 3. c. 8. after the 25th of March 1697, no perſon ſhall work or make any manufacture of ſilver, leſs in fineneſs than 11 ounces and 10 penny-weights of fine ſilver in every pound troy; nor put to ſale, exchange, or ſell any ſuch made after that time, (unleſs it be ſilver wire or ſuch ſmall things as are not capable of receiving a mark,) until ſuch time as the ſame ſhall be marked as therein deſcribed. And if the wardens and maſters of the ſaid myſtery mark any plate for good contrary to the act, they ſhall alſo forfeit the value of the plate ſo deceitfully marked, to be recovered in like manner.

Wardens, &c. fraudulently marking, &c.

6 G. 1. c. 11. ſ. 41. *Allowing two different ſtandards for ſilver wares with reſpective marks, 11 oz. 10 dwt. and 11 oz. 2 dwt.*

By ſtat. 6 Geo. 1. c. 11. ſ. 41. reciting, that it may be requiſite for encouraging the ſeveral manufactures of wrought plate to continue both the ſtandard of plate of 11 ounces 10 penny-weights, and alſo the ſtandard of 11 ounces

11 ounces 2 penny-weights (*a*) to the pound troy, enacts, that from the 1ſt of June 1720 all ſilver veſſels of plate or manufactured of ſilver ſhall not be leſs in fineneſs than thoſe reſpective ſtandards, each to be marked with diſtinguiſhing marks; the greater ſtandard with the workman's mark, the mark of the wardens of the goldſmiths' company, and with the figure of a lion's head eraſed, and the figure of the Britannia; and the leſſer ſtandard with the workman's mark, that of the wardens of the goldſmiths' company, and with the figure of a lion paſſant, and the figure of a leopard's head; and that it ſhall not be lawful to make any manufactures of ſilver of a coarſer allay than above ſpecified, under the penalties and forfeitures preſcribed *by any laws then in force concerning wrought plate.*

Ch. IV. § 32. *Standard.*

The ſtat. 12 Geo. 2. c. 26. reciting ſeveral prior ſtatutes for regulating the ſtandards of gold and ſilver plate, enacts, "that after the 28th of May 1739 no goldſmith, ſilverſmith, or other perſon making, trading, or dealing in gold or ſilver wares, within England, ſhall work, or make, or cauſe, &c. any gold veſſel, plate, or manufacture of gold whatſoever leſs in fineneſs than 22 carrats of fine gold in every pound weight troy; or any ſilver veſſel, &c. leſs in fineneſs than 11 ounces 2 penny-weights of fine ſilver in every pound troy; nor ſell, exchange, or expoſe to ſale, or export out of this kingdom any gold or ſilver manufacture, &c. leſs in fineneſs than ſuch reſpective ſtandards, on forfeiture of 10 l. for every ſuch offence, one moiety to the king, the other to any informer who will ſue; and in default of payment the defendant ſhall be committed by the court in which judgment ſhall be given thereon to the houſe of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding ſix months, or until payment." The act contains exceptions of certain ſmall wares particularly deſcribed. By ſ. 3. "Perſons (other than the makers or workers thereof) dealing, &c. in gold or ſilver wares, exporting, ſelling, or expoſing to ſale the ſame worſe than the reſpective ſtandards, who ſhall within fourteen days after notice of the coarſeneſs thereof diſcover to the party grieved, or to the maſter, wardens, or clerk of any of the companies of goldſmiths of the place where ſuch dealer reſides, the name and place of abode of the maker or worker thereof, or of the

12 G. 2. c. 26. *regulating ſtandards of gold and ſilver wares.*

Dealers, &c. exempt from proſecution on diſcovery of the maker.

(*a*) For this laſt ſtandard *vide* ſtat. 18 Eliz. c. 15.

perſon

Ch. IV. § 32. *Standard.*

perſon of whom ſuch dealer really bought the ſame, and ſhall produce him if living, ſo that he may be proſecuted; and if ſuch dealer ſhall give material evidence againſt ſuch perſon, and the judge before whom the trial is had ſhall under his hand on the record certify the ſame, and alſo that there did not appear any ground to believe that ſuch dealer, &c. was privy to the fraud; or if ſuch dealer ſhall, on the trial of any ſuit or proſecution againſt himſelf, concerning the premiſes, prove that he delivered to ſuch maker or worker a ſufficient quantity of ſtandard gold or ſilver to make the ſaid wares, and paid a reaſonable price for the faſhion thereof, or paid the maker or worker or other perſon a market price for ſtandard gold or ſilver of that weight, beſides a reaſonable price for the faſhion thereof; then ſuch dealer, &c. ſhall be diſcharged from any penalty or forfeiture to be incurred by this act for exporting, ſelling, or expoſing to ſale ſuch coarſe gold or ſilver wares, and from any action, ſuit, or proſecution for the ſame." Provided (ſ. 4.) "that ſuch dealer, &c. need not give material evidence, or produce ſuch certificate as aforeſaid, in order to indemnify himſelf from any penalty or forfeiture under this act, unleſs ſuch trial againſt ſuch maker, worker, or other perſon of whom the ſaid wares were bought, ſhall be had within four terms after ſuch diſcovery made, nor unleſs reaſonable notice ſhall be given to ſuch dealer, &c. of the time of ſuch trial."

Limitation of proſecution.

Marks. Selling, &c. or exporting gold or ſilver wares without ſuch marks.

By ſ. 5. "after the 28th of May 1739 no goldſmith, ſilverſmith, or other perſon whatſoever making or ſelling, trading or dealing in gold or ſilver wares, ſhall ſell, exchange, or expoſe to ſale, within England, any gold or ſilver manufacture whatſoever, made after that time, or export the ſame out of this kingdom, until ſuch manufacture of gold (being of the ſtandard of 22 carrats of fine gold per pound troy) and ſuch manufacture of ſilver (being of the ſtandard of 11 ounces 2 penny-weights of fine ſilver per pound troy) ſhall be marked with *the mark of the worker or maker*, which ſhall be *the firſt letters of his chriſtian and ſurname*, and with theſe marks of the goldſmiths' company in London, viz. *the leopard's head, the lion paſſant, and a diſtinct variable mark or letter* to denote the year in which ſuch plate ſhall be made; or with *the mark of the worker or maker*, and with *the marks of the aſſayers at York, Exeter, Briſtol, Cheſter, Norwich, or Newcaſtle-upon-Tyne*; or plate (being of the ſtandard of 11 ounces 10 penny-

10 penny-weights of fine ſilver per pound troy) with *the worker or maker's mark as aforeſaid*, and with theſe marks of the ſaid company, viz. *the lion's head eraſed*, *the figure of a Britannia*, and the *ſaid mark or letter* to denote the year as aforeſaid; or with *the worker or maker's mark*, and *the marks of one of the ſaid cities or towns*; upon pain of forfeiting 10l., half to the crown, and half to any informer who will ſue; and for default of payment the offender ſhall be committed by the court in which judgment ſhall be given thereon to the houſe of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding ſix months, or until payment be made of the ſaid forfeiture." Ch. IV. § 32. *Standard marks.*

By ſ. 6. certain wares by reaſon of their ſmallneſs or thinneſs are excepted from being marked.

By ſtat. 24 Geo. 3. c. 53. ſ. 5. (to denote the payment of a certain duty) over and beſides the other legal marks, there is required on the ſame manufactures, when ſent to be aſſayed and marked, the mark of *the king's head*; on pain of forfeiting (by ſ. 8.) under the like circumſtances as are before mentioned in the former act, 50l., to be recovered and diſpoſed of as aforeſaid, or in default of payment to be committed in like manner to the houſe of correction, not exceeding one year, or leſs than ſix months, or until payment, and alſo on pain of forfeiting the gold or ſilver manufacture ſo ſold, exchanged, or expoſed to ſale without ſuch mark, one moiety to the crown, the other to any perſon who will ſue, with the like exceptions as in the former ſtatute. 24 G. 3. c. 53. ſ. 5. *The duty mark.*

The ſtat. 30 Geo. 3. c. 31. repeals the exceptions in the two laſt-mentioned acts, as to ſilver wares, and enacts others in lieu thereof. 30 G. 3. c. 31. ſ. 1. *Repealing exceptions of former acts, and making new exceptions.*

Laſtly, By the ſtat. 38 Geo. 3. c. 69. ſ. 1. it is enacted, "that from and after the 1ſt of October 1798, it ſhall be lawful for any goldſmith or other perſon making, trading, or dealing in gold wares in Great Britain, to work or make any gold veſſel, plate, or manufacture of gold whatſoever of the ſtandard of 18 carrats of fine gold in every pound weight troy, and to ſell, exchange, or expoſe to ſale, or export the ſame out of the kingdom." By ſ. 2. "After the ſaid 1ſt of October 1798, no perſon ſhall ſell, exchange, or expoſe to ſale, or export out of the kingdom, any ſuch manufacture of gold made after that time, until marked with a crown 38 G. 3. c. 69. *Giving a lower ſtandard for gold manufactures.*

Ch. IV. § 32. *Standard marks.*

crown and the figures 18, inſtead of the mark of the lion paſſant, on forfeiture of 10 l.; which mark is (by ſ. 3.) to be affixed by the reſpective companies of goldſmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and aſſayers of gold at York, Exeter, Briſtol, Cheſter, Norwich, and Newcaſtle-upon-Tyne." By ſ. 4 & 5. this is not to prevent the making, ſelling, &c. manufactures of gold of the ſtandard of 22 carrats directed by former laws; but not to authorize the aſſaying or marking with the mark uſed before the act any gold manufactures of lower ſtandard than 22 carrats per pound troy. But by ſ. 6. the making or ſelling of any manufacture of gold after the ſaid firſt of October, not duly marked with one of the marks required by law to denote the reſpective ſtandards, is ſubjected to a forfeiture of 50 l. By ſ. 7. the counterfeiting of any of the aſſay marks, and removing them from one piece of manufacture to another, or ſelling, &c. the article with ſuch forged or removed mark, knowingly, is made felony, puniſhable with tranſportation for ſeven years. By ſ. 8. all the powers, regulations, forfeitures, methods, &c. preſcribed by the act of the 12 Geo. 2. c. 26. or by any other act therein referred to, or ſtill in force, are made applicable with reſpect to manufactured gold of the ſtandard of 18 carrats thereby allowed, except where otherwiſe provided for expreſsly by this act.

See tit. Forgery more at large.

§ 33. *Reſult of the ſtatutes.* Ante, f. 1. 28 Ed. 1. ſt. 3. c. 20. 17 Ed. 4. c. 1. *Vide* 1 Hale, 191.

Hence it appears, that by the ſtat. 28 Ed. 1. ſt. 3. c. 20. all gold manufactures were required to be made of good and true alloy, that is, not worſe than the touch of Paris. By ſtat. 17 Ed. 4. c. 1. gold was not to be manufactured under the fineneſs of 18 carrats in the pound troy, which was increaſed to 22 carrats by ſtat. 18 Eliz. c. 15. and ſo continued by the ſtat. 12 Geo. 2. c. 26. ſ. 1. in reſpect of all goods manufactured after the 28th of May 1739. But by the ſtat. 38 Geo. 3. c. 69. ſ. 1. it was again permitted to be manufactured at the lower ſtandard of 18 carrats after the 1ſt of October 1798.

Marks for gold manufactures of 22 carrats.

By ſtat. 12 Geo. 2. c. 26. ſ. 5. manufactured gold of the ſtandard of 22 carrats ſhall have, 1. the worker or maker's mark, viz. the firſt letters of his chriſtian and ſurname; 2. the marks of the goldſmiths' company in London, viz. the

the leopard's head, the lion paſſant, and a diſtinct variable mark or letter to denote the year in which it was made: or elſe it ſhall have, 1. the worker or maker's mark, together with, 2. the marks of the aſſayers at York, and other places named, (i. e. reſpectively, according to the party's place of reſidence). By the ſtat. 38 Geo. 3. c. 69. ſ. 1. manufactured gold of the ſtandard of 18 carrats ſhall be marked with a crown and the figures 18 inſtead of the lion paſſant, to be affixed by the reſpective companies of goldſmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and aſſayers, &c. at York, Exeter, &c.

Ch. IV. § 33. *Standard mark.*

Of 18 carrats.

Vide poſt.

By ſtatutes 28 Ed. 1. ſt. 3. c. 20. and 17 Ed. 4. c. 1. ſilver manufactures were to be of true ſterling allay or better, the value of which has been noticed before. By ſtat. 4 H. 7. c. 2. the ſilver was to be made fine enough to bear 12 penny-weights of allay per pound weight. By the ſtat. 18 Eliz. c. 15. the ſtandard was ſettled at 11 ounces 2 penny-weights to the pound troy. This by ſtat. 8 W. 3. c. 8. was raiſed to 11 ounces 10 penny-weights in reſpect of goods manufactured after the 25th of March 1697. But the ſtat. 6 Geo. 1. c. 11. ſ. 41. confirmed by the ſtat. 12 Geo. 2. c. 26. ſ. 5. ratified both the ſtandards again under diſtinguiſhing marks, the one from the 1ſt of June 1720, the other from the 1ſt of October 1798, as after-mentioned. Silver manufactures of ſterling allay were by the ſtat. 28 Ed. 1. ſt. 3. c. 20. to be aſſayed by the wardens of the goldſmiths' company, and marked with the leopard's head. The marks were afterwards varied on the change of the ſtandard by the ſtat. 8 W. 3. c. 8., and diſtinguiſhing marks given by the ſtat. 6 Geo. 1. c. 11. ſ. 41. upon eſtabliſhing the two different ſtandards before mentioned. The marks in uſe ſince the 28th of May 1739 are fixed by the ſtat. 12 Geo. 2. c. 26. to be, for manufactured ſilver of the ſtandard of 11 oz. 2 dwt. per pound troy, the ſame marks as are before ſet by the ſame ſtatute for manufactured gold of 22 carrats. And for manufactured ſilver of the ſtandard of 11 oz. 10 dwt. the worker or maker's mark as aforeſaid, and theſe marks of the goldſmiths' company in London, viz. the lion's head eraſed, the figure of Britannia, and a diſtinct variable mark or letter to denote the year in which it was made; or elſe with the worker or maker's mark, and the marks of the aſſayers at York, Exeter, &c.

Silver ſtandard ſterling.

Ante, ſ. 1.

Vide 5 H. 4. c. 4. & 14 G. 2. c. 41.

1 Hale, 644.

11 oz. 7 dwt. per pound troy.

11 oz. 10 dwt.

Marks. Sterling.

11 oz. 2 dwt. ſupra.

11 oz. 10 dwt.

Ch. IV. § 33. *Standard marks.*

In addition to the marks above mentioned, there is another mark common both to gold and ſilver manufactures of whatever ſtandard, namely, the mark of the king's head; which by ſtat. 24 Geo. 3. c. 53. is required in all inſtances where other marks are neceſſary, to denote the payment of a certain duty.

Gold and ſilver additional mark. 24 G. 3. c. 53. ſ. 5.

§ 34. *Offences and puniſhments.*

The principal offences created by theſe ſtatutes are the making, working, putting to ſale, exchanging, ſelling, or exporting any gold or ſilver manufactures of leſs fineneſs than the ſtandards reſpectively fixed at the time by the ſeveral acts. Beſides the particular penalties and forfeitures inflicted on the delinquents, or in default of payment the commitment to the houſe of correction, it is to be remembered that the ſtat. 28 Ed. 1. ſt. 3. c. 20. is ſtill in force, which ſubjects them to a diſcretionary fine and impriſonment: and though the deſcription of the offence therein is not ſo large as in the ſubſequent ſtatutes, yet the penalty of it ſeems virtually to be adopted in the latter by general words of reference to former laws. Beſides which, I conceive that offenders of this deſcription fraudulently affixing public and authentic marks on goods of a value inferior to ſuch tokens are liable to ſuffer at common law upon an indictment for a cheat.

Rex v. Jackſon, Cowp. 297.

Vide tit. Cheats.

Joſeph Fabian a working goldſmith was indicted for falſifying plate, by putting in too much allay, and then corrupting one of the aſſay maſter's ſervants to help him to the proper marks, with which he ſtamped his plate; and being convicted was fined 100 l. and adjudged to ſtand three times in the pillory; and was alſo forejudged of his trade that he ſhould not uſe that trade again as a maſter workman. Such a judgment muſt have been at common law.

Fabian's caſe, O. B. 1664, Kel. 39.

Vide tit. Forgery, Stamps.

I have in another place mentioned the offence of forging the marks on bullion or wrought plate.

2. *Counterfeiting Bullion.*

§ 35. *Counterfeit Bullion.*

The counterfeiting of bullion in the maſs is alſo provided againſt, with a view to diſcourage falſe coining as well as private impoſitions.

8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25. ſ. 3. *Blanching copper for ſale, or mixing it with ſilver, or*

By ſtat. 8 & 9 W. 3. c. 26. "If any perſon whatſoever after the 15th of May 1697 ſhall blanch copper for ſale, or mix blanched copper with ſilver, or knowingly buy or ſell or offer to ſale blanched copper alone, or mixed with ſilver; or ſhall

shall knowingly and fraudulently buy or sell or offer to sale any malleable composition, or mixture of metals or minerals, which shall be heavier than silver, and look and touch and wear like standard gold, but be manifestly worse than standard; every such person shall be guilty of felony, and being thereof convicted or attainted shall suffer death." By s. 7. the corruption of blood is saved; and by s. 9. the prosecution must be commenced within three months after the offence committed.

Ch. IV. § 35. *Counterfeit Bullion.*

buying, selling, or offering to sale such or the like; or any composition like gold.

3. *Exportation of Bullion.* § 36.

At former periods the exportation of bullion has been prohibited by various statutes; but these having been found greatly inconvenient to commerce, the stat. 15 Car. 2. c. 7. s. 12. provides, that any person may export any foreign coin or bullion duty free, first making an entry thereof in the custom-house. But it having been found that, under colour of this regulation, English money or wrought plate had been melted down into the form of foreign coin, or bullion, for the purpose of exportation, the stat. 6 & 7 W. 3. c. 17. s. 3. enacts, that none shall cast or make ingots, or bars of silver, in imitation of Spanish bars or ingots of silver, nor stamp any mark or impression upon any ingot or bar in likeness of the Spanish marks or impression, on pain for each offence of forfeiting the silver so cast, and 500 l., half to the king, and half to the informer. And by s. 5. "No person shall transport or cause to be transported out of England into parts beyond the seas any molten silver, but only such as shall be marked or stamped at goldsmiths' hall, &c. nor without a certificate under the hands of one of the wardens of the goldsmiths' company, that oath has been made by the owner or owners thereof, and likewise by one credible witness, that the same is lawful silver; and that no part thereof was (before the same was molten) the current coin of this realm, nor clippings thereof, nor plate wrought within this kingdom," &c. And by s. 6. "Any custom-house officer may seize any molten silver put on board any vessel without such mark or stamp and certificate." By s. 13. of the same act, "in case of any seizure of any bullion shipped to be exported, if any doubts shall arise whether the same be English or foreign, the proof shall lie upon the owner, claimer, or exporter, that the same is foreign bullion, and has not been melted down

Exportation of Bullion.
1 Hawk. ch. 18. s. 6.
1 Hale, 654.
15 Car. 2. c. 7.

6 & 7 W. 3. c. 17. s. 3.

Ingots or bars made in imitation of Spanish prohibited.

Bullion exported must be stamped.

If doubt arise proof lies on the owner.

Ch. IV. § 36. *Exportation.*

in England," &c. And by ſ. 14. " if any perſon ſhall enter or ſhip any bullion allowed by the act to be exported, other than in the name of the true owner, proprietor, or importer, the exporter ſhall forfeit the ſame or the full value thereof, half to the king, and half to the perſon ſeizing or diſcovering." Alſo by ſtat. 7 & 8 W. 3. c. 19. ſ. 6. " no perſon ſhall ſhip or cauſe to be ſhipped any molten ſilver or bullion whatſoever, in any form, unleſs a certificate be firſt obtained from the court of the lord mayor and aldermen of London; oath having been made before the court by the owners and two witneſſes, that the ſame was and is foreign bullion, and that no part thereof was the coin of this realm, or the clippings thereof, nor plate wrought within this kingdom," &c.; " which oath the ſaid court ſhall circumſtantially certify to the commiſſioners of the cuſtoms before any cocket ſhall be granted for ſhipping the ſame, on pain to the owner of loſs of the goods and forfeiting double the value; to the captain the forfeiture of 200 l., and if in the king's ſervice, the loſs of command; to the cocket officer 200 l., and incapacity to hold any office."

7 & 8 W. 3. c. 19. ſ. 6. *Certificate from the lord mayor and aldermen.*

§ 37.

4. *Sale of Bullion.*

Sale of bullion. 6 & 7 W. 3. c. 17. ſ. 7. *Brokers prohibited from buying or ſelling bullion.*

The exportation of gold or ſilver manufactures under the ſtandard allay allowed by law, has been juſt noticed.

By ſ. 7. of ſt. 6 & 7 W. 3. c. 17. " If any broker, not being a trading goldſmith or refiner of ſilver, ſhall buy or ſell any bullion or molten ſilver, he ſhall ſuffer impriſonment for ſix months without bail." This regulation was probably intended to prevent gambling ſpeculations which might enhance the price of the precious metals.

§ 39.

5. *As to the Poſſeſſion of Bullion unaccounted for.*

6 & 7 W. 3. c. 17. ſ. 8. *Perſons having ſilver bullion found in their poſſeſſion under certain circumſtances of ſuſpicion, ſhall upon indictment be bound to prove it to be lawful bullion, on pain of ſix months' imprisonment.*

The ſtat. 6 & 7 W. 3. c. 17. ſ. 8. for " preventing the counterfeiting and clipping the coin of this kingdom," after impoſing certain penalties and other puniſhment on perſons ſelling or paying broad ſilver money, or money unclipped, for more than it is coined for; or caſting bars of ſilver in imitation of the Spaniſh; or for buying, ſelling, or having clippings or filings; and after prohibiting the exportation of bullion except it be properly ſtamped, and ſubjecting it to ſeizure if ſhipped, and inflicting impriſonment on brokers trading in bullion; enacts by ſ. 8. that for the better diſcovery of

of offenders in the premiſes, that one or more of the wardens of the goldſmiths' company, with any two or more of the court of aſſiſtants of the ſaid company within the bills of mortality, or any two juſtices of the peace within any county, city, or town corporate, out of the bills of mortality, may enter into the houſe, room, or workſhop of any perſon ſuſpected of buying or ſelling unlawful bullion, and ſearch for the ſame; and in caſe the occupier of ſuch houſe, &c. ſhall refuſe to permit the ſaid warden and aſſiſtants, or juſtices, to make ſuch ſearch as aforeſaid, they may, with the aſſiſtance of a conſtable, break open any door, box, &c. in order to ſearch for ſuch bullion; and in caſe of finding any ſuch, ſhall ſeize as well the ſame as the perſon and perſons in whoſe poſſeſſion it ſhall be found; and the ſaid wardens, aſſiſtants, and conſtables ſhall bring the parties before the next juſtice of the peace, who ſhall, upon oath made of ſuch finding (which juſtice within the bills of mortality, and the ſaid two juſtices without the ſaid bills of mortality, ſhall and may) examine the perſon ſo brought before him, or found by them reſpectively, upon oath, whether the bullion ſo found be lawful ſilver, and whether the ſame were not (before the melting thereof) the current coin of this kingdom, or clippings thereof; and in caſe the perſon ſo examined ſhall not prove by their oath, or by the oath of one credible witneſs, before the ſaid juſtice and juſtices reſpectively, that the bullion ſo found is lawful ſilver, and that the ſame was not, before the melting thereof, the current coin of this realm, nor clippings thereof, then the ſaid juſtice or juſtices reſpectively ſhall commit the perſon ſo examined to priſon, and ſhall ſecure the bullion ſo found, and ſhall likewiſe oblige the perſons that can give any evidence concerning the ſame to enter into recognizance to proſecute the ſaid offender and offenders; and in caſe ſuch offender and offenders, in whoſe poſſeſſion ſuch unlawful bullion ſhall be found, ſhall not, upon their trials on an indictment for melting the current ſilver coin of this realm, prove by the oath of one credible witneſs at the leaſt, the bullion ſo found to be lawful ſilver, and that the ſame was not the current coin of this realm, nor clippings thereof, then, and for want of ſuch proof, ſuch offender ſhall be found guilty of the offence contained in ſuch indictment, and ſhall ſuffer impriſonment for the ſpace of ſix months, without bail or mainprize."

CHAP. V.

OF HOMICIDE.

The ſeveral Kinds and reſpective Puniſhments thereof. - - - - § 1.

1. *Felonious.*
   1. Murder. § 2. Clergy. - § 3.
   2. Manſlaughter. - - - § 4.
   3. Suicide. - - § 5.
2. *Juſtifiable* or *excuſable.* - - § 6.
   1. *Juſtifiable* ex neceſſitate. i. In Advancement of Juſtice. ii. In Execution of Juſtice. iii. In defence of Perſon or Property. iv. On a fatal Neceſſity. - - § 7.
   2. *Excuſable.* i. Upon Chancemedley. ii. By Miſadventure. - - § 7, 8.

   What Verdict may be found in theſe Caſes. § 6, 7 & 8.

The ſeveral Claſſes of Caſes referable to the abovementioned Heads. - § 9.

I. *Homicide from Malice aforethought expreſs, where the deliberate Purpoſe of the Perpetrator was to deprive another of Life, or do him ſome great bodily Harm.* - § 10.

1. *From a particular Malice to the Deceaſed.* § 11.

   Evidence of it.

   Malice by Implication of Law ariſes from the Act of killing: Circumſtances of Juſtification, Excuſe, or Extenuation, to be proved by Priſoner. § 12.

Circum-

Circumſtances which might otherwiſe rebut ſuch Preſumption no Anſwer to Proof of expreſs Malice. Duelling. Poiſoning. § 12.

Actual Force will excuſe killing, but not moral Force, ſuch as Threats. *ib.*

Manner of Death, however various, not material; if by Malice, Murder in all: if only by culpable negligence, Manſlaughter. But Malice muſt be of corporal Damage to the Party to make Murder. Expoſing ſick Perſons, or Infants. Neglecting and ill-treating Infant Apprentices. - - § 13.

Againſt whom Malice may be directed. - § 14.

Againſt all in the King's Peace. Againſt alien Enemy, except in War: or attainted Felon. But not againſt Child in ventre ſa mere. *ib.*

Malice may be exerted againſt one in his Abſence, or by his own Command. *ib.*

Concealment of Death Evidence of Murder of *Baſtard* by ſtat. 21 Jac. 1. c. 27. § 15.

What is ſufficient Evidence of Diſcloſure to take the Caſe out of the Statute. *ib.*

Malice againſt a Man's own Life; *Felo de ſe.* § 16.

2. *Homicide from a particular Malice to one, which falls by Miſtake or Accident upon another.* - § 17.

The Act done follows the Nature of the Act intended. Miſtaking one Perſon for another. Offering Poiſon to one who innocently gives it to another. Killing a Woman by Practices intended to procure Abortion. Killing one's ſelf by an Act directed againſt another. If the intended Act would have been only Manſlaughter, the Act done will be no more. *ib.*

3. *Homicide from a general Malice or depraved Inclination to Miſchief, fall where it may.* - § 18.

The Act muſt be unlawful, attended with probable Danger, and done with miſchievous Intent to hurt, to make Murder. *ib.*

If done deliberately, Malice is preſumed. Riding unruly Horſe into a Crowd. Throwing Stones

into a Street. If the Act only done incautiously, Manslaughter. Resolution to oppose all Opposition in committing Trespass, Murder. § 18.

II. *Homicide from Transport of Passion, or Heat of Blood.* - - § 19.

Upon what Principle the Offence is extenuated. Not where express Evidence of Malice. *ib.*

1. *What a sufficient Provocation to extenuate the Homicide.* - - - § 20.

Not Words, nor Gestures, nor Threats, without an Act; but personal Assaults, especially if with Circumstances of Violence or Indignity, are sufficient. So are injurious Restraints of Liberty. So the Detection of an Adulterer. *ib.*

But not even Assaults, if trivial, and cruelly revenged. - - - § 21.

Still less, smaller Provocations, if dangerous Weapons used, or any Excess in the Manner; such as Trespasses on Property, petty Thefts, fighting between Children. - - § 22.

Result of the Cases on extenuating Provocations. § 23.

No Provocation will avail if sought; or if the Act be done on old Grudge. *ib.*

2. *How far Heat of Blood is an Extenuation of Homicide independent of reasonable Provocation.* - § 24.

On mutual Combat, on sudden Occasion, and equal Terms, without Malice; but not on deliberate Duelling; the Seconds equally guilty. *ib.*

Combat must be *equal* to extenuate Homicide. § 25.

Aliter if Assault with deadly Weapon before Adversary prepared, or if several attack one. *ib.*

But sufficient if Combat equal at the *Onset*, to reduce Offence to Manslaughter. - § 26.

Same Rules apply where Blow intended for one falls by Mistake or Accident on another in the Contest. - - § 27.

3. *What Cases of this Sort are affected by the Statute of Stabbing.* 1 Jac. 1. c. 8. - § 28.

The

The Statute only declaratory of the common Law. *ib.* Malice neceſſary to bring a Caſe within it. §28 & 29.

i. It extends not to Aiders and Abettors. §29.

ii. What a *Stab* or *Thruſt*. iii. Any Perſon armed in aid of the Party killed at the Time takes the Caſe out of the Statute. iv. So if the Party be armed at any Time of the Affray before the mortal Stroke. v. What *a Weapon drawn*. vi. A Blow given at any Time before the mortal Stroke takes the Caſe out of the Statute. *ib.*

4. *How long the Law will allow for the Blood continuing heated under the Circumſtances, and what is Evidence of its having cooled.* - - §30.

Length of Time between Provocation and mortal Stroke. Manner of Death. Other intervening Diſcourſe, Amuſement, or other Circumſtances. Deliberation. Leſs Allowance to be made for Exceſs of Retaliation in Proportion to the Length of Time intervening. Former Provocation no Excuſe againſt expreſs Malice at the Time. *ib.*

III. *Homicide in the Proſecution of an Act or Purpoſe unlawful in itſelf, wherein Death enſues collaterally to or beſide the principal Intent.* - - - §31.

1. *Where the Act on which Death enſues is malum in ſe.* ib.

If Felony, Murder: if Treſpaſs, Manſlaughter. Stat. de Malefactoribus in Parcis, 21 Ed. 1. juſtifies killing Deer-Stealers, extended by Stat. 3 & 4 W. & M. c. 10. and 4 & 5 W. & M. c. 23. *ib.*

Unlawful Intent of bodily Harm, but not of Death; Murder, or Manſlaughter, according to Circumſtances. - - §32.

If without ſuch Intent, Manſlaughter. *ib.*

Confederacy to do unlawful Acts implicates all concerned. Murder, if Death enſue in forcible Proſecution of them: aliter, if the killing were accidental,

accidental, without relation to the principal Deſign. In ſmuggling: in reſiſting a Diſtreſs. §33.
To affect all the Confederates, the killing muſt be during actual Strife or abetting of all. §34.
Entry upon Claim of Title by Force. *ib.*
2. *Where Death enſues on an Act malum prohibitum.* §35.
Shooting at Game and accidentally killing a Perſon, Miſadventure. *ib.*

IV. *Homicide from Impropriety, Negligence, or Accident, in the Proſecution of an Act lawful in itſelf, or intended as a Sport or Recreation.* - - §36.
Diſtinction between Acts of Impropriety, Negligence, and Accident. *ib.*
1. *To make Miſadventure, the Act intended muſt be lawful, and done without Intention of bodily Harm, and with proper Caution.* ib.
Correction in foro domeſtico. - §37.
Accidents in the Purſuit of common Occupations. - - §38.
Workmen throwing Rubbiſh. Driving Carriages. Overloading Boats, or Stage Coaches. *ib.*
Adminiſtering Medicine ignorantly. *ib.*
Wilful Neglect to provide againſt probable Miſchief, as in keeping miſchievous Animals. §39.
Want of due Caution in uſing dangerous Inſtruments, &c. Manſlaughter. But the utmoſt poſſible Precaution not required. §40.
2. *Diſtinct Conſideration of Homicide at Sports, &c.* §41.
If Sport innocent and allowable, and Death accidentally happen, Miſadventure. If unlawful or dangerous, Manſlaughter. Manly Sports, though with ſome Riſk, allowable, if uſual Caution taken. Playing with Foils, Cudgels, &c. Shooting at Game or Butts. *ib.*
But Death at Prize-fightings, Cock-fightings, &c. Manſlaughter, though unintentional. §42.
Concluſion. - - §43.

V. *Homicide*

V. *Homicide from Neceſſity in Defence of a Man's own Perſon or Property, or of the Perſons or Property of others.* § 44.

1. *What Attacks it is juſtifiable to reſiſt by Death of Aſſailant.*

Attacks of Felons endeavouring by Violence or Surprize to commit a known Felony. Party may purſue the Felon till out of Danger. But a bare Fear of ſuch Offence not ſufficient to juſtify killing in Prevention: nor Commiſſion of a Treſpaſs. Stat. 24 H. 8. c. 5. juſtifying the killing of Robbers, Murderers, and Burglars, made in Affirmance of common Law. *ib.*

Diſtinction as to Felonies without Force or Atrocity, ſuch as picking Pockets: there killing in Prevention not juſtified. - § 45.

Killing by Miſtake, on reaſonable Ground for imputing felonious Intent; Manſlaughter or Miſadventure according to Circumſtances. § 46.

Miſtaking Bailiff for Thief; one Perſon in a Mob for another dreſſed like him; a Servant concealed in the Night for a Houſebreaker; a Man for a Deer treſpaſſing; a Commander trying the Vigilance of a Sentinel for an Enemy. *ib.*

Queſtions concerning Apparency of Intent to commit ſuch Felony as juſtifies killing in Prevention. - - - § 47.

Throwing a Bottle at the Head of another with great Violence. Diſtinction between ſuch Caſes and Caſes of Combat on equal Terms. Where firſt Attack was with plain Intent only to chaſtiſe for Miſbehaviour, killing thereon Manſlaughter. *ib.*

Party juſtifying killing another on Neceſſity muſt be wholly without Fault. - § 48.

Not like killing on Entry under Claim of Title; nor on meeting one, though accidentally, againſt whom he had ill Blood. Nor if he had firſt made a felonious Attack on the other without lawful Provocation, though afterwards willing to retreat. *ib.*

Caſe of Officers of Juſtice. - § 49. & Poſt.

2. *Where killing another in Self-defence is only excuſable.* § 50.

Where Neceſſity in Part created by the Perſon's own Fault. *ib.*

Homicide, "*upon Chancemedley in* Self-Defence," is properly when Death enſues from Combat on ſudden Quarrel. Induces Forfeiture of Goods, but Pardon and Reſtitution of courſe. *ib.*

To reduce the Crime to Self-defence upon Chancemedley, the Party muſt decline the Combat before a mortal Stroke, and afterwards kill his Adverſary through Neceſſity to avoid Death. § 51.

Difference between that and Manſlaughter. *ib.*

Diſtinction between Self-defence and Miſadventure, where Death happens by Accident in a Combat. - - - § 52.

No Diſtinction as to firſt Aſſault in Caſes of Combat by Conſent. - - § 53.

To make Chancemedley, the firſt Aſſault muſt not be upon Malice. - - § 54.

How far Retreat will avail in premeditated Duelling, or on a ſudden Combat, or after a felonious Aſſault without Provocation. *ib.*

There muſt be a Neceſſity in Fact to excuſe the killing purpoſely in any Caſe. What is Evidence of it. - - § 55.

Killing another who was holding him down and beating him, not ſo; but Manſlaughter. But where the Blow or Inſtrument was not probably calculated to kill, and was lawfully exerted in Self-defence, though no Danger of Death at the Time, Qu. the Caſe may amount only to Miſadventure? *ib.*

Homicide in defence of Property, diſtinguiſhable on what Grounds. - - § 56.

More Latitude allowed in defence of a Man's own Houſe. *ib.*

3. *By whom ſuch Juſtification or Excuſe may be urged.* § 57.

All preſent may juſtify killing to prevent Felony intended, and not otherwiſe to be prevented. *ib.*

Interfering

Interfering in mutual Combats or ſudden Affrays between others. - - § 58.

Precautions to be adopted. Qu. The Difference between the Caſe of a Friend, Relation, or Servant, and a mere Stranger interfering. If the Intent be to preſerve the Peace, and due Notice given, the killing may be juſtifiable; aliter, if to take Part with either Side; for then the Degree of Guilt depends on the Circumſtances. But the Guilt of the Aider may ſtill be leſs than that of the Principal, if the former acted on a ſudden without Malice. *ib.*

Where the Party interfering is killed. § 59.

4. *How far the Neceſſity extends.* - § 60.

In no Caſe will the killing of another be juſtified or excuſed beyond the actual Continuance of the Neceſſity which gave Riſe to it: but in ſome Caſes Allowance will be made for the Blood being heated on the Occaſion. *ib.*

5. *Neceſſity induced by mutual Misfortune.* § 61.

Killing an innocent Perſon for Self-preſervation will *excuſe* rather than *juſtify*. But in no Caſe if the Act be done under the Influence of a Threat of future Miſchief. *ib.*

VI. *Homicide in the Advancement or Execution of the Laws.* - - § 62.

Introduction. *ib.* Trial by Battle. *ib.*

General Principles. - - § 63.

Perſons authorized to arreſt, or otherwiſe to advance Juſtice, and uſing proper Means, are juſtified in killing ſuch as reſiſt, if neceſſary. And if killed by others in ſo doing, Murder in all concerned. There muſt be a legal Authority to do the Act, otherwiſe Manſlaughter. *ib.*

Caſe of Soldier ſtabbing a Serjeant who arreſted him. *ib.*

Party arreſted not implicated in Reſiſtance by a third Perſon, without his Privity. *ib.*

Officers protected in diſcharge of their Duty eundo, morando, et redeundo. *ib.*

But though Officers need not retreat, yet not juſtified in killing Reſiſters without Neceſſity. § 63.
Protection of Officers extends to their Aſſiſtants, § 64.
And to private Perſons under certain Circumſtances acting of their own accord in Aid of Juſtice. *ib.*
Application of the general Principles to (§ 65.)

1. *Homicide on the Arreſt of Perſons.* § 66.

1. *Death happening on the Arreſt of Perſons upon a Felony done or ſuppoſed.* - - § 67.
Duties of Officers and private Perſons on Felony committed. *ib.*
On Felony committed, but not by the Party ſuſpected and purſued. - § 68.
Private Perſons acting under their own Authority againſt ſuch not entitled to the ſame Protection as Officers or others acting in Execution of a Duty impoſed on them by Law. *ib.*
Quære, in caſe of an Indictment found againſt the ſuppoſed Felon. *ib.*
Conſtable acting on Information of private Perſon; Precautions to be taken. - § 69.
Where Doors may be broken open. *Poſt.*

2. *Homicide on Arreſt of Perſons in Caſes of Miſdemeanor and Breach of the Peace.* - § 70.
Killing on Flight, Murder in general: Manſlaughter under ſpecial Circumſtances. Killing by Officer, if neceſſary on Reſiſtance, lawful. Murder if he be killed. Killing malefactores in parcis on Flight, juſtifiable by the Statute. Aliter of Night Walkers. *ib.*
Breaches of the Peace in view of the Conſtable or others interfering to prevent it. § 71.
There muſt be Notification expreſs or implied of the public Character in the one Caſe, or the friendly Intention on the other, to juſtify Homicide; otherwiſe Manſlaughter. *ib.*
Peace Officers taking oppoſite Parts in Affray. *ib.*
Arreſt by Conſtable on Information of a Breach of the Peace out of his View. - § 72.

There

There ought regularly to be a Warrant of a Magiſtrate for this Purpoſe, unleſs in urgent Caſes for the Purpoſe of carrying the Offender before a Magiſtrate, or to prevent a probable Felony. - - § 72.

Arreſt on *Proceſs* in caſe of Miſdemeanor. § 73.

3. *Homicide on Arreſt in civil Suits.* - § 74.

Murder, if deadly Weapon uſed on bare Flight; Manſlaughter if Weapon not likely to kill. But if Reſiſtance be made, Officer need not give back, and Death of Party juſtifiable if Reſiſtance not otherwiſe to be overcome. *ib.*

Private Perſon cannot arreſt in civil Suits. *ib.*

4. *Homicide on Occaſion of Preſſing.* - § 75.

The Right of impreſſing confined to Mariners. There muſt be a legal Warrant. It muſt be executed by a proper Officer. On Reſiſtance, the Officer may freely repel Force by Force ſufficient to overcome the Reſiſtance: but killing Party on Flight, Murder, if intentional; Manſlaughter, if not. *ib.*

5. *How far the Legality of the Proceſs, or Informality in the Manner of making the Arreſt, material in caſe of Homicide on Arreſt.* - - § 76.

i. *The Court from whence the Proceſs iſſues muſt have Juriſdiction*, otherwiſe killing thereon Manſlaughter. - - - - § 77.

Except where Officer indemnified by Statute 24 G. 2. c. 44. *ib.*

ii. *The Proceſs muſt be legal in its Frame.* Then Officer juſtified, though erroneouſly iſſued, or Charge falſe. - - § 78.

But if Warrant altered after the Iſſue of it, or it be defective in its Frame, Manſlaughter. *ib.*

Preſs-Warrants. - - - § 79.

iii. *The Proceſs muſt be executed by a legal Officer or his Aſſiſtant, and due Notice given*, in order to juſtify him; otherwiſe killing him in the Struggle by the Party arreſted, only Manſlaughter; but Murder in the Officer killing the Party, if done wilfully and without Provocation. § 80.

There

There muſt be due Notice of Officer's Authority to juſtify him: but this to be implied from public Enſigns of Authority, &c. - §81.

Conſtable de facto acting within his Diſtrict ſufficient. *ib.*

Notice to ſome in an Affray, and not to others. §82.

How far Notice neceſſary to one who ignorantly oppoſes an Officer doing his Duty, but with Intent to preſerve the Peace. - §83.

Such Notice of the Buſineſs neceſſary alſo in Caſes of Arreſt on Proceſs. - §84.

How far Warrant to be ſhewn. *ib.*

If Party knew the Officer or his Buſineſs before, no Occaſion to repeat Notice. - §85.

In general Murder to kill the Officer, if due Notice given; Manſlaughter if not. *Per tot.*

iv. *The Proceſs muſt be executed and Arreſt made duly and according to Law* to juſtify the Officer killing another in the Execution thereof. §86.

If he kill him unneceſſarily, or with Cruelty and in Revenge for a ſlight Reſiſtance, it may amount to Murder. *ib.*

Where Doors may be broken open to make an Arreſt. - - §87.

The Owner's Privilege confined to civil Suits; to outward Doors; to the Occupier and his Family; and to Arreſts in the firſt Inſtance. *ib.*

Time for making Arreſts. - §88.

In all Caſes however there muſt be previous Notification of Buſineſs, and Demand to enter, and Refuſal. *ib.*

v. *How far a Defect in any of the above Particulars may be urged by a third Perſon interfering and killing an Officer making the Arreſt.* §89.

How far illegal Arreſt of another is a ſufficient Provocation to another to reduce the killing the Officer to Manſlaughter. Semble it muſt be governed by ſame Conſiderations as regulate the Caſe of killing another in a common Affray.

2. *Homicide*

2. *Homicide in endeavouring to keep in ſafe Cuſtody Perſons arreſted, and in Confinement.* - - - § 90.

1. *By the Officer arreſting.* Officer killing Party eſcaping or reſcued juſtifiable in caſe of Felony, if not otherwiſe to be re-taken. *ib.* Aliter, in caſes of Miſdemeanor or civil Proceſs, unleſs actual Reſiſtance, in which caſe Officer need not retreat. *ib.*

2. *By Gaolers, &c.* Killing Priſoners, or others in aid of them, on Reſiſtance made, juſtifiable. § 91. Killing of Gaoler by ſuch Perſons, Murder. *ib.* But in order to juſtify Homicide it muſt be upon Neceſſity to prevent Eſcape. *ib.*

Killing Priſoner by Dureſs, without ſuch Neceſſity, Murder. - - § 92.

Death from want of neceſſary Suſtenance, Cloathing, &c. or reaſonable care in Sickneſs, Murder. *ib.*

3. *Touching the Execution of Criminals.* § 93.

1. How far the Witneſſes on whoſe Teſtimony the Verdict and Judgment are founded, are implicated in the rectitude of the conſequent Execution - - § 94.

2. How far the Judge is reſponſible for the competency of his Juriſdiction. - - § 95.

How far the Officer who executes the Sentence. *ib.* The Officer at all events excuſed if the Court had Juriſdiction over the offence, however erroneous the proceeding. *ib.*

3. To what extent the Execution muſt conform to the Judgment. - - § 96.

If the Officer, without warrant or colour of authority, vary from the Judgment, it is Murder. *ib.*

4. The Execution muſt be by the proper Officer or his appointed Deputy, otherwiſe Murder. § 97.

VII. *Petit Treaſon.*

Wherein is to be conſidered how far all or any of the circumſtances treated of under the fore-

going Heads vary the Degree and Puniſhment of Homicide committed againſt Maſters, Huſbands, or Eccleſiaſtical Superiors, by their Servants, Wives, or Eccleſiaſtical Inferiors. § 98.

1. *Of the Offence itſelf. ib.*

Petty Treaſon is Murder aggravated by the relation of the Party killing to the Deceaſed. *ib.*

The Fact muſt amount to Murder. Pardon of Murder includes Petty Treaſon. *ib.*

It may be committed

i. By a Servant killing his Maſter, or one who ſtands in the relation of Maſter. § 99.

ii. By a Wife killing her Huſband; but not e converſo. - - § 100.

By a Wife divorced a menſâ et thoro, but not a vinculo matrimonii. *ib.* What ſhall be deemed ſufficient evidence of Marriage in ſuch caſes. *ib.*

iii. By a Clergyman killing his Superior, to whom he owes canonical obedience. § 101.

Who are ſuch. *ib.*

2. *Concerning Principal and Acceſſaries in Petit Treaſon.* § 102.

One may be guilty of Petit Treaſon, the other of Murder, where both are Principals; but the Acceſſary cannot be guilty of a greater offence than the Principal. *ib.*

3. *As to the Indictment and Verdict in Petit Treaſon.* § 103.

Whether one guilty of Petit Treaſon may be indicted of Murder. *ib.* One indicted of Petit Treaſon may be found guilty of Murder only, if the relation be not proved. Two may be indicted together, one for Petit Treaſon, the other for Murder. *ib.*

4. *As to the Witneſſes.* - - § 104.

Two neceſſary in Petit Treaſon. *ib.*

5. *Trial.* - - - - - § 104.

To be according to common Law. *ib.*

Of the Indictment, Appeal, and Evidence.

General Rules. - - § 105.

In

In caſe of Homicide, uſual to prefer Indictment for Murder, if any doubt. Acquittal thereon, a bar to any other Indictment for the ſame death. - - § 105.

Preſumption of Malice ariſes from the Fact of killing; and circumſtances of Alleviation to be proved by Defendant. - § 106.

Particular Form.

1. *As to Principals.*

Manner of death to be ſet forth. § 107.

But if proof agree in ſubſtance, it is ſufficient. *ib.*

Inſtrument of death to be ſtated, and how holden, and the Value of it. § 108.

It muſt allege *a Stroke*, where death happened by ſuch means. - - § 109.

It muſt deſcribe the Wound. - § 110.

Death by means ſtated muſt be poſitively alleged, and not left to implication. - § 111.

Alſo Time, and Place, and reſpective Times of Wound and Death. - - § 112.

But proof of other Times within year and day from the Stroke, ſufficient. *ib.*

What Evidence ſufficient of death happening mediately or immediately from the act of the Party. - - § 113.

If the Death were haſtened by ſuch means, Party is accountable. *ib.*

Naming the Deceaſed. - - § 114.

Not neceſſary to ſtate other ſpecial circumſtances of the caſe. - - - § 115.

Terms of Art neceſſary to be uſed. § 116.

How Bill altered where Grand Jury find Bill for Manſlaughter only. *ib.*

Apt Concluſion. - - § 117.

Indictment on *Statute of Stabbing.* 1 *Jac.* 1. c. 8. § 118.

None but the Party actually ſtabbing is within the Statute. *ib.*

All may be found guilty of Manſlaughter at common Law. - - § 118.

Indictment on ſtat. 21 *Jac.* 1. *c.* 27. for *Murder of Baſtard Child.* - - § 119.
Not neceſſary to conclude contra formam Statuti; for the Statute only makes the Concealment *Evidence* of Murder. *ib.*

Appeal of Death, wherein diſtinguiſhable from Indictment for ſame offence. - § 120.
As to Time. As to Party by whom preferred. By Wife, or by Heir. Where the King may pray execution. *ib.*

2. *As to Accomplices.* - - § 121.
Several preſent may be charged with different degrees of guilt in ſame indictment. If all contributed or aided, all may be charged as Principals; and evidence that one gave the Stroke proves indictment charging it to have been given by another of them. Aliter, on Statute of Stabbing. Qu. Where Principal acquitted, and Aider and Abettor convicted? *ib.*
The Abetment ſhould be laid to the Stroke, and not to the Death. *ib.*
Wife not excuſed by Huſband's preſence. *ib.*

3. *Acceſſaries*; how their offence to be laid. § 122.
How far one who incited to the Death, and was afterwards preſent, can be charged as Acceſſary before. *ib.*
One acquitted as Acceſſary before may be charged as Principal. *ib.*
Incitement, how to be charged. *ib.*
Of charging Acceſſaries in one county to Murder in another. *ib.*
No Acceſſaries to Manſlaughter. - § 123.

Particular Evidence.

Declarations of the Deceaſed. - § 124.
Deceaſed muſt be conſcious of danger at the time. *ib.* Declarations of the Deceaſed, though particeps criminis. *ib.* Declarations of Deceaſed before a Magiſtrate on oath, evidence within Stat. of Ph. & Mar., though no belief of danger.

ger. *ib.* Declarations of Wife againſt her Huſband. *ib.*

The Judge, and not the Jury, to decide whether Deceaſed thought himſelf in danger, previous to admiſſion of the evidence. - § 124.

Articles of War, how given in evidence. § 125.

Of the Trial, Arraignment, Verdict, and Judgment, &c. - - § 126.

1. *Trial.*

In what County? ib.

i. Where Stroke and Death in ſame County. § 127.
Within the Verge. *ib.*

ii. Where Stroke and Death in different Counties. § 128.

iii. Where Acceſſary in one County to Murder in another. - - § 129.

iv. Where Stroke and Death in Wales: § 130.
Or one in Engliſh County, and the other in Wales. *ib.*

v. Where Stroke at Sea or out of England, and Death in a County, or vice verſâ. - § 131.

vi. Where Stroke and Death at Sea. - § 132.
What ſhall be conſidered within the Admiralty Juriſdiction. *ib.*

vii Where Stroke and Death in parts beyond Sea. § 133.
In Newfoundland, and the Iſles thereto belonging. *ib.*

2. *Arraignment.* - - § 134.
On Indictment and Coroner's Inquiſition at the ſame time. *ib.*

3. *Verdict.* - - § 135.
May negative the higher and find leſſer offence charged. May find different Degrees of guilt in different Defendants. Special finding. *ib.*

4. *Judgment.* - - § 136.
In *Petit Treaſon.* In *Murder. ib.*
How regulated by Stat. 25 Geo. 2. c. 37. ſ. 3. *ib.*

Extends to Peers. *ib.* Regulations of Convicts. *ib.*
Offence of Reſcuers before and after execution. - - §136.
In *Manſlaughter*, &c. *ib.*

The ſeveral Kinds of Homicide, and the reſpective Puniſhments thereof.

§ 1. *The ſeveral kinds. Vide* 3 Inſt. 54. & Foſt. 255.

HOMICIDE, which is here uſed to denote the killing of a perſon by whatever means, is uſually treated of under the heads of murder, (of which petit treaſon is a more aggravated ſpecies,) ſelo de ſe, manſlaughter, per infortunium or chance-medley, and homicide ex neceſſitate; which latter relates either to the execution or advancement of juſtice, or to ſelf-defence. But as the ſhades between ſome of theſe are in many inſtances very faint, and as the difficulty in this branch of law lies chiefly in diſcriminating between the one and the other, a different arrangement ſeems neceſſary in order to facilitate inquiry and avoid repetition as much as poſſible. It is therefore propoſed to treat of theſe ſeveral ſorts of homicide as they ariſe out of ſubjects and ſituations moſt familiar to common underſtanding, and agreeable to the uſual courſe of human affairs. Previous however to the conſideration of theſe heads it will be proper to take a review of the ſeveral terms made uſe of in our law to expreſs the different degrees of the offence now treating of; together with the puniſhments annexed to each: after which it will only be neceſſary to refer particular caſes to this or that head; by which means the proportionable enormity or alleviation of the offence will be diſtinctly underſtood.

§ 2. *Felonious homicide.*

Felonious homicide may be either againſt the life of another, or againſt a man's own life. The former is of two ſorts, *murder*, and *manſlaughter*.

Murder. 3 Inſt. 47. 51. 2 Ld. Raymond, 1487. 3 Hale, 425. 1 Hawk ch. 31. § 3. 18. Kel. 127. Foſt. 256. 4 Binc. Com. 198. Pal. de Pace, 123. b.

1. *Murder*, in the ſenſe in which it is now underſtood, is the voluntarily killing any perſon (which extends not to infants in ventre ſa mere) under the king's peace, of malice prepenſe or aforethought either expreſs or implied by law: the ſenſe of which word *malice* is not only confined to a particular

ticular ill-will to the deceaſed, but is intended to denote, as Mr. Juſtice Foſter expreſſes it, an action flowing from a wicked and corrupt motive, a thing done malo animo, where the fact has been attended with ſuch circumſtances as carry in them the plain indications of an heart regardleſs of ſocial duty and fatally bent upon miſchief. And therefore malice is implied from any deliberate cruel act againſt another, however ſudden.

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See the hiſtory and definition of the term *Murder* per Holt, C. J. in Mawgridge's caſe, Kel. 121. 124. 126, 7. 3 Inſt. 52.

When this malice is exerted to the death of a maſter by his ſervant, or of a huſband by his wife, or of an eccleſiaſtic ſuperior by one owing obedience to him as ſuch, it takes the name of *petit treaſon*.

The groſſer inſtances of murder, where the depravity of the heart or malice above-mentioned is apparent, form the 1ſt claſs of caſes under this head. 2. Where an officer, or one who aſſiſts in the advancement of juſtice where he lawfully may, is killed in the regular diſcharge of his duty. 3. Where a private man, lawfully interfering to prevent a breach of the peace, is oppoſed in ſuch his endeavour, and ſlain. 4. Where death happens incidentally in the proſecution of ſome other felony. 5. Where it happens from other unlawful acts, of which death was the probable conſequence, done deliberately, and with intention of miſchief or great bodily harm to particulars, or of miſchief indiſcriminately fall where it may; though the death enſue againſt or beſide the original intent of the party. 6. From deliberate duelling.

§ 3. *Clergy.*

Clergy is taken away in all caſes of murder and petit treaſon from acceſſaries before as well as principals; and lands and goods are forfeited; the forfeiture in ſuch caſe relating back to the ſtroke or other cauſe of the death.

Vide Foſt. 304, &c. 1 Hale, 426.

The queſtion of clergy in caſes of murder and petit treaſon ſtands on ſeveral ſtatutes, of which I ſhall take a ſhort review. Theſe are the ſtatutes 12 H. 7. c. 7., 1 Ed. 6. c. 12., 4 & 5 Ph. & M. c. 4, and 3 & 4 W. & M. c. 9. ſ. 2. I forbear to rely on the ſtat. 28 H. 8. c. 1. or the 25 H. 8. c. 3. which as to the point of ouſting clergy ſtand repealed in all reſpects not re-enacted by the 1 Ed. 1. c. 12. ſ. 10. For although Hawkins thinks that the whole of the

2 Hawk. ch. 33. ſ. 30. and *vide* 1 Hale, 450.

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ſtat. 25 H. 8. c. 3. and ſo much of the ſtat. 23 H. 8. c. 1. as is therein recited and affirmed, were revived by the ſtat. 5 & 6 Ed. 6. c. 10., yet both Lord Hale and Foſter J. are expreſsly of a different opinion: and it does indeed ſeem a violent conſtruction of that act ſo to conſider them. The ſtat. 12 H. 7. c. 7. is included in the terms of the ſtat. 1 Edw. 6. c. 12. ſ. 10. (and ſ. 13.) which enacts, that no perſon "attainted or convicted of murder of malice prepenſed, or of poiſoning of malice prepenſed, or being indicted or appealed thereof, and thereupon found guilty by verdict, or ſhall confeſs the ſame upon arraignment, or will not anſwer directly according to law, or ſhall ſtand wilfully or of malice mute," ſhall have the benefit of clergy; and "that in all other caſes of felony other than ſuch as before mentioned, all perſons arraigned, or found guilty upon their arraignment, or who ſhall confeſs the ſame, or ſtand mute, in form aforeſaid, ſhall have the benefit of clergy in like manner as before the 1 H. 8." with a proviſo ſ. 11. that all clauſes, articles, and ſentences in any acts of H. 8., touching any manner of challenge for the county, hundred, or peremptory challenge, or touching any trial of foreign pleas pleaded by murderers, felons, or other offenders, ſhall as concerning the ſaid challenges and trial remain unrepealed. The above recited 10th ſection of the ſtatute does not indeed mention petit treaſon in terms, as the ſtat. 12 H. 7. c. 7. does with reſpect to lay perſons after conviction or attainder, and as the abovementioned ſtatutes of H. 8. had done in the caſes therein mentioned: but it is agreed by all that petit treaſon is included under the term *murder*: and ſo attainder includes outlawry.

3 Hale, 146, 7. Foſt. 330, &c.

2 Hale, 342. 2 Hawk. ch. 33. ſ. 12. 55. Foſt. 329, 330.

But the caſe of the principal in murder or petit treaſon challenging more than the proper number, (which had been ouſted of clergy in the caſe of indictments by the ſtat. 25 H. 8. c. 3.,) ſtill remained unprovided for either by the ſtat. 1 Edw. 6. or the ſtat. 12 H. 7., and the ſtat. 3 & 4 W. & M. c. 9. ſ. 2. which ſupplies the place of the ſt. 25 H. 8. in this reſpect is ſtill confined to the caſe of *indictments*. So that the caſe of the principal in murder or petit treaſon, challenging more than the proper number upon an appeal, was not ouſted of clergy by any of the abovementioned ſtatutes.

ſtatutes. But the ſtat. 4 & 5 Ph. & M. c. 4. ouſts clergy with reſpect to acceſſaries before in murder and petit treaſon from all perſons "outlawed, or arraigned and found guilty, or otherwiſe lawfully attainted, or convicted, or ſtanding mute, or peremptorily challenging above 20, or not anſwering directly to the offence." This extends to appeals as well as indictments; and Hawkins puts it as a queſtion to be conſidered, whether the ouſting of clergy from the acceſſaries before in theſe caſes does not neceſſarily ouſt it from the principals in the like inſtances. Lord Hale and Foſter J. are decidedly of opinion that it does. Admitting this concluſion to be juſt in all caſes where the contrary is not expreſſed by or to be implied from the terms uſed by the legiſlature, another difficulty ariſes. It is generally agreed, and the practice is conformable thereto, that in petit treaſon the defendant is entitled to a peremptory challenge of 35; upon this ground, that though the ſtat. 22 H. 8. c. 14. reduced the number to 20, (which ſtood unrepealed by virtue of the beforementioned proviſo in the ſtat. 1 Edw. 6. c. 12.) yet that the ſtat. 1 & 2 Ph. & M. c. 10., in providing that "all trials of any treaſon ſhall be had and uſed only according to the due order and courſe of the common law," has reſtored the number to 35 in caſe of petit treaſon. Now if the reaſoning be true, which is generally admitted, that the ſtat. 4 & 5 of Ph. & M. c. 4. by ouſting clergy from the acceſſary before, by neceſſary implication ouſts it from the principal in the like caſes, it ſhould follow that the acceſſary before having been ouſted by that ſtatute in the caſe of challenging peremptorily above 20, as well in caſes of petit treaſon as of murder, the principal in petit treaſon is precluded from any greater number of challenges than that under the like penalty. Yet I think the diſtinction I before hinted at is a ſolution of the difficulty; for the inference is only to be made when, and ſo far only as the contrary is not expreſſed by, or to be implied from, the terms of the legiſlature: and here are two exiſting ſtatutes in pari materiâ, which are to be made to ſtand together as far as may be, from both which taken together it appears, that the legiſlature intended to allow to the principal a peremptory challenge of 35, and to the acceſſary before only 20. At this day however the

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2 Hawk. ch. 33. § 56.

2 Hale, 347. Foſt. 333, 4, 6.

2 Hale, 269. 339. 2 Hawk ch. 43. § 8. Foſt. 337. 4 Blac. Com. 354.

1 & 2 Ph. & M. c. 10. § 7.

2 Hale, 270. 339. 345. 4 Blac. Com. 354.

conſequence

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conſequence of challenging more than the proper number is, by a beneficent conſtruction of the ſtat. 22 H. 8. c. 14., only this, that the challenge ſhall be over-ruled.

2 Hale, 342, 4.

Acceſſaries after the fact either in petit treaſon or murder are in no inſtance ouſted of clergy.

§ 4. *Manſlaughter.* 1 Hale, 449, 450. 466. 3 Inſt. 55. 1 Hawk. ch. 30. ſ. 2. *Vide* R. v. Mawgridge, Kel. 124. Foſt. 290.

2. *Manſlaughter*, which is principally diſtinguiſhable from murder in this, that though the act which occaſions the death be unlawful, or likely to be attended with bodily miſchief, yet the malice either expreſs or implied, which is the very eſſence of murder, is preſumed to be wanting in manſlaughter; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient. It follows that though there may be ſeveral principals, there cannot be any acceſſaries before to manſlaughter, becauſe it muſt be done without premeditation; but there may be acceſſaries after.

Vide Lord Cornwallis's caſe, Dom. Proc. 1678. 2 St. Tr. 730.

Puniſhment. 1 Hale, 466. 4 Blac. Com. 193. 19 Geo. 3. c. 74. ſ. 3, 4.

The offence amounts to felony, but within the benefit of clergy; and the offender ſhall be burned in the hand, and forfeit all his goods and chattels. By ſtat. 19 Geo. 3. c. 74. ſ. 3 & 4. the burning in the hand may in the diſcretion of the court be changed to a moderate fine; but not to whipping: but this does not prevent the court from alſo adjudging the offender to be impriſoned for any term not exceeding a year.

1 Jac. 1. c. 8. *Vide* poſt. ſ. 28.

The benefit of clergy is however taken away by the ſtat. 1 Jac. 1. c. 8. (commonly called the ſtatute of ſtabbing) in one ſpecies of killing, though done upon a ſudden provocation; namely, the offence of mortally ſtabbing another under certain circumſtances.

Homicide on the high ſeas. Foſt. 278. 2 Hale, 369.

With reſpect to indictments for homicide on the high ſeas, before the admiralty ſeſſions, under the ſtat. 28 H. 8. c. 15.; inaſmuch as the marine law does not allow of clergy in any caſe, if the fact appeared upon the evidence to be no more than manſlaughter at common law, the priſoner was prior to the ſtat. 39 Geo. 3. c. 37. conſtantly directed to be acquitted. But now by ſ. 2. of that act, "perſons tried for murder or manſlaughter committed upon the ſea, by virtue of any commiſſion directed under the former act, and found guilty of manſlaughter only, ſhall be entitled to receive the

39 Geo. 3. c. 37. ſ. 2.

the benefit of clergy in like manner, and ſhall be ſubject to the ſame puniſhment, as if they had committed ſuch manſlaughter on the land."

Ch. V. § 4. *Manſlaughter.*

The caſes falling under the head of manſlaughter are either, 1ſt, where death enſues from actions in themſelves unlawful, but not proceeding from a malicious or felonious intention; 2dly, from actions in themſelves lawful, but done without due care and circumſpection for preventing miſchief; 3dly, where death enſues upon a ſudden combat or affray; or, 4thly, from heat of blood upon a reaſonable provocation given.

§ 5. *Felo de ſe.*

3. The laſt kind of felonious homicide is that againſt a man's own life, which denominates the party ſlaying himſelf *felo de ſe*. This is where any one wilfully or by any malicious act cauſes his own death. The law regards this as an heinous offence, though the party himſelf may at firſt view appear to have been the only ſufferer: for as the public have a right to every man's aſſiſtance, he who voluntarily kills himſelf is with reſpect to the public as criminal as one who kills another. It is equally an offence againſt the fundamental law of ſociety, which is protection. The law has therefore ordained as ſevere a puniſhment for it as the nature of the caſe will admit of, namely, an ignominious burial in the highway with a ſtake driven through the body; and a forfeiture of all the offender's goods and chattels to the king. The uſual inſtances of this ſort of offence are either, 1ſt, where felo de ſe intended his own death; or, 2dly, where he intended ſome other felony, in attempting which he accidentally ſlew himſelf.

1 Hale, 411. 4 Blac. Com. 189, 190. Poſt. c. 16. and *vide* the next chapter *as to the form of the inquiſition.*

3 Inſt. 54, 5. 1 Hawk. ch. 27. ſ. 7, 8. 1 Hale, 413. 4 Blac. Com. 190.

§ 6. *Juſtifiable or excuſable homicide.*

There are other degrees of homicide which do not amount to felony, but are either *juſtifiable*, or *excuſable*.

1. To make homicide *juſtifiable*, it muſt ariſe from an imperious duty preſcribed by the law, or be owing to ſome unavoidable neceſſity induced by the act of the party killed, without any manner of fault in the party killing. In theſe caſes it is now clearly underſtood that the jury may acquit the party generally, without obliging him by a ſpecial finding of the matter to purchaſe his pardon under the ſtatute of Glouceſter, c. 9.; and no forfeiture is incurred.

1 Hawk. ch. 28. ſ. 1. 22.

Poſt. 279. 288. 1 MS. Sum. 38, 9. 1 Hale, 471. 477. 492, 3. 2 Hale, 304. 3 Inſt. 814. 4 Blac. Com. 182. 188.

2. Homicide

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Excuſable.
Foſt. 279. 289.
1 MS. Sum. 39. 157.
1 Hal. 478. 492.
3 Inſt. 55, 6.
Pult. de Pace, 12 b
1 Hawk. ch. 29. ſ. 25.
2 Hawk. ch. 37. ſ 2.
4 Blac. Com. 188.
MS. Burner, 41.
Foſt. ſ. 8.

2. Homicide is only *excuſable* where the party killing is not altogether free from blame; but the neceſſity, which renders it excuſable, may be ſaid to be partly induced by his own act. And here the party ſeemed formerly not entitled to a verdict of acquittal, but the jury would find the facts ſpecially; on which the court would bail the party, whoſe goods were forfeited at common law, to the next ſeſſions or term; and upon certifying the record into Chancery, a pardon iſſued of courſe under the ſtatute of Glouceſter, c. 9. to have them reſtored, without any application to the king, only paying for ſuing out the ſame. Of late years however it has been more frequent, in caſes even of excuſable homicide, for the court to direct a verdict of acquittal.

The ſeveral deſcriptions of homicide referable to either of the two laſt heads come next to be conſidered.

§ 7.
Ex neceſſitate, in advancement of juſtice.
Foſt. 270, 1, 2.

1. Homicide *ex neceſſitate*, which is of three ſorts:

1. *In advancement of juſtice*, which is juſtifiable by *permiſſion* of the law. This is where perſons having authority to arreſt or impriſon others, or to ſeize goods, or interfering to preſerve the peace, and uſing proper means for that purpoſe, are reſiſted in ſo doing, and the party reſiſting is killed in the ſtruggle; or where a felony has been committed, or a dangerous wound given, and the offender flies from juſtice; if in the purſuit the party flying be killed, the perſon killing is juſtified, provided the other could not be otherwiſe overtaken. Here is conſiderable, 1ſt, What cauſes or warrant ſhall juſtify the killing of a perſon reſiſting or flying from an arreſt. 2dly, To whom ſuch juſtification ſhall extend.

In execution of juſtice.

2. Homicide *in execution of juſtice;* which is *juſtifiable by the command* of the law. This is the carrying into execution the ſentence of the law on malefactors condemned to death. Herein has been generally conſidered, 1ſt, How far the execution may vary from the ſentence; 2dly, How far a want of juriſdiction in thoſe who paſs the judgment ſhall affect themſelves or thoſe who carry ſuch judgment into execution; 3dly, How far they are affected by the execution of an erroneous judgment; 4thly, To what extent a falſe witneſs is implicated.

In defence of perſon or property.

3. Homicide *in defence of perſon or property* under certain circumſtances of neceſſity. This is either *juſtifiable* by *permiſſion*

miſſion of the law, or only *excuſable*. Firſt, That neceſſity, which *juſtifies* a man in killing another who comes to commit a known felony with force againſt his perſon, his habitation, or his property. In ſuch caſes the injured party may repel force by force, and is not obliged to retreat, but may purſue his adverſary in order to ſecure himſelf from danger. Secondly, That which only *excuſes* him who kills another in his own defence upon a ſudden combat, having firſt retreated as far as he could with ſafety, and with a view of declining the combat, before any mortal blow given; and having no other poſſible or at leaſt probable method of eſcaping his own immediate deſtruction or great bodily harm. This is denominated in legal phraſe "homicide ſe defendendo upon chance-medley." Here *chance-medley* is uſed in the proper ſenſe of the word, as will be preſently remarked. There is a third ſort of dire neceſſity, which is not induced by the fault of either party, where one of two innocent men muſt die for the other's preſervation: this has been holden by ſome to be *juſtifiable*; perhaps it may more properly be conſidered as *excuſable*: *juſtification* is founded upon ſome poſitive duty; *excuſe* is due to human infirmity. The queſtions uſually made on the two former heads are, 1ſt, In what inſtance the party killing may attack or purſue? 2dly, Where he is bound to retreat? 3dly, Where the plea of neceſſity fails him altogether, notwithſtanding ſuch retreat?

Ch. V. § 7. *Ex neceſſitate, in ſelf defence.*

Foſt. 273, 5, 9. &c.

Foſt. 276, 7. 4 Blac. Com. 184, 5. 1 MS. Sum. 41. *Vide* ſt. 24 H. 8. c 5. Poſt. ſ. 44. 50.

Dalt ch. 98. Bract. 120.

§ 8. *Miſadventure and chance-medley.*

2. The other kinds of homicide, not felonious, and by law deemed *excuſable*, are when the death happens either by *miſadventure*, or by *chance-medley*, properly ſo called.

The ancient legal notion of homicide by chance-medley was, when death enſued from a combat between the parties upon a ſudden quarrel; but it has ſince been frequently confounded with miſadventure or accident. Homicide by miſadventure is, when a man doing a lawful act, without any intention of bodily harm, and uſing proper precaution to prevent danger, unfortunately happens to kill another perſon. This is one ſpecies of *excuſable* homicide. But inaſmuch as no blame is imputable in any degree to the party under the circumſtances above ſuppoſed; and on the contrary, ſuch an one ſeems more entitled to compaſſion than to cenſure; it ſeems

3 Inſt. 55, 7. Foſt. 275. *Vide ſupra.*

Foſt. 258. 1 Hawk. ch. 29. ſ. 1. 1 Hale, 472.

4 Blac. Com. 182. Ante, ſ. 6.

Ch. V. § 8. *Miſadventure.*

ſeems to be now ſettled, whatever may have been formerly thought, that the jury under the direction of the court may acquit the party generally, without putting him to purchaſe a pardon under the ſtatute of Glouceſter, c. 9. The act upon which the death enſues muſt be lawful in itſelf; for if it be malum in ſe, the caſe will amount to felony, either murder or manſlaughter, according to the circumſtances. If it be merely malum prohibitum, as ſhooting at game by an unqualified perſon, that will not vary the degree of the offence. The uſual examples under this head are, 1ſt, where death enſues from innocent recreations; 2dly, from moderate and lawful correction in foro domeſtico; 3dly, from acts lawful or indifferent in themſelves done with proper and ordinary caution.

Vide 2 Inſt. 148. 315. Stat. of Marlb. c. 26. Poſt. 288. 4 Blac. Com. 188. *Vide* 1 Hale, 477. 492. 2 Hale, 303. Ante, f. 6. Poſt. 258.

§ 9. *The ſeveral claſſes of caſes referable to the offences before mentioned.*

Having thus aſcertained the terms made uſe of in our law for denoting the different degrees of guilt in homicide, and the nature of the puniſhments which may be inflicted on the ſeveral offenders; I now proceed to the conſideration of the facts conſtituting the ſeveral offences, and the inveſtigation of thoſe principles on which are founded the ſeveral gradations of guilt above enumerated. The ſubject of homicide has uſually been treated of under artificial terms; but for the reaſons firſt mentioned, I have thought it ſerviceable to attempt a more natural arrangement of it. Homicide will therefore be conſidered as it ariſes,

Ante, 214.

I. *From malice aforethought expreſs; where the deliberate purpoſe of the perpetrator was to deprive another of life, or do him ſome great bodily harm.*

II. *From tranſport of paſſion or heat of blood; wherein is to be conſidered under what circumſtances it may be preſumed that the act done, though intentional of death or great bodily harm, was not the reſult of a cool deliberate judgment and malignity of heart, but imputable to human infirmity alone.*

III. *In the proſecution of ſome other criminal or unlawful act or purpoſe, wherein death enſues collaterally to or beſide the principal intent.*

IV. *From impropriety, negligence, or accident, in the proſecution of an act lawful in itſelf, or intended as a ſport or recreation.*

V. *From neceſſity or defence of a man's perſon or property, or of the property or perſons of others.* Ch. V. § 9. *The ſeveral claſſes of caſes, &c.*

VI. *In advancement or execution of the laws.*

VII. *It will be conſidered how far all or any of theſe conſiderations and circumſtances vary the nature of the offence as applied to maſters, huſbands, or eccleſiaſtical ſuperiors, killed by their ſervants, wives, or inferiors.*

I. *Homicide from Malice aforethought expreſs; where the deliberate Purpoſe of the Perpetrator was to deprive another of Life, or do him ſome great bodily Harm.* § 10.

This either ariſes,

1. *From a particular malice to the perſon killed.*
2. *From a particular malice to one, which falls by miſtake or accident upon another:* or,
3. *From a general malice or depraved inclination to miſchief, fall where it may.*

§ 11. *From particular malice to the deceaſed.* Ante, f. 2.

1. The malice is either directed againſt the life of another, or againſt a man's own life.

Having before explained the meaning of the word malice, as applied to homicide, under the definition before given of murder, it is only neceſſary to ſay here, that in all caſes where the homicide is founded upon ſuch pre-conceived malice, whatever might be the immediate occaſion of exerting it, the crime amounts to murder. The groſſer inſtances of wilful murder, where the malignity of the heart is apparent, need no explanation: the circumſtances of every ſuch caſe are peculiar to itſelf. Perhaps ſtrong circumſtantial evidence in caſes of crimes like this, committed for the moſt part in ſecret, is the moſt ſatisfactory of any from whence to draw the concluſion of guilt: for men may be ſeduced to perjury by many baſe motives, to which the ſecret nature of the offence may ſometimes afford a temptation; but it can ſcarcely happen that many circumſtances, eſpecially if they be ſuch over which the accuſer could have no control, forming altogether the links of a tranſaction, ſhould all unfortunately 1 MS. Sum. 259.

Ch. V. § 11. *From particular malice to the deceaſed.*

nately concur to fix the preſumption of guilt on an individual, and yet ſuch a concluſion be erroneous. Lord Hale however recommends, that in theſe caſes there ſhould be evidence of the dead body's having been found; to which perhaps it may be added, that the conduct of the perſon accuſed ſhould appear ſuch as is reconcileable with the facts alleged in proof of his guilt. Lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do a perſon ſome bodily harm, are ſome of the many circumſtances which are evidence of a particular malice.

2 Hale, 290.

1 Hale, 451.

§ 12. *Malice by implication of law.* Foſt. 255. 1 Hale, 455. Poſt. ſ. 106.

The implication of malice ariſes in every inſtance of homicide amounting in point of law to murder: and in every charge of murder, the fact of killing being firſt proved, all the circumſtances of accident, neceſſity, or infirmity, are to be ſatisfactorily proved by the priſoner, unleſs they ariſe out of the evidence produced againſt him. But it is intended here only to ſpeak of the more deliberate and depraved ſpecies of that offence, where the mind has brooded upon its prey, and marked out the object of deſtruction in cool blood. And therefore ſuffice it to ſay upon this head, that in all caſes where it appears that there was an interval of reflection, or a reaſonable time for the blood if it had been heated to cool, after which the deadly purpoſe is effected; however grievous the provocation may have been, the party killing is guilty of murder; for vengeance belongs not to man. Let it alſo be remembered, that however a provocation received may rebut the implication of malice, it will be no anſwer in alleviation to expreſs malice proved. And therefore if upon a provocation received one party deliberately and adviſedly denounce vengeance againſt the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his deſign into execution, he will be guilty of murder; although the death happened ſo recently after the provocation as that the law might, apart from ſuch evidence of expreſs malice, have imputed the act to unadviſed paſſion. But where freſh provocation intervenes between pre-conceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; which may be difficult in ſome caſes to ſhew ſatisfactorily, if the new provocation were a grievous one.

"*Vengeance is* "*mine: I will* "*repay; ſaith* "*the Lord*" Rom. xii. 19. MS. Tracy, 47. 1 Vent. 159. 1 Hale, 452. Oneby's caſe, 2 Ld. Ray. 1490. Poſt. ſ. 19. 23.

one. In ſuch caſes, ſays Hawkins, it ſhall not be preſumed that they fought on the old grudge, unleſs it appear by the whole circumſtances of the fact. But with reſpect to poiſoning, that neceſſarily implies malice, however great the provocation may have been, becauſe it is a deliberate act. On account of its ſingular enormity, it was made treaſon by the ſtat. 22 H. 8. c. 9.; but that was afterwards repealed by ſtat. 1 Ed. 6. c. 12. ſ. 10 & 13. which again makes it wilful murder, and takes away clergy.

Ch. V. § 12. *From particular malice to the deceaſed.*

1 Hawk. ch. 31. ſ. 30. 1 Hale, 452. 455. 3 Inſt. 48. 4 Blac. Com. 193. 200. Foſt. 68.

Not only he who kills another in a deliberate duel, let the provocation have been what it may, but his ſecond alſo is guilty of murder: and it has been doubted whether this does not extend even to the ſecond of him who was killed, becauſe the death happened upon a compact in which all were engaged. But I ſhall have occaſion to revert to this queſtion in another place, to which I refer.

Dueling. 1 Hale, 453. 441. Taverner's caſe, 3 Bulſtr. 171, 2. 1 Roll. Rep. 360, 1. Poſt. ſ. 59. Poſt. ſ. 24.

If A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B., as by threatening him with dureſs or impriſonment, or even by an aſſault to the peril of his life, in order to compel him to kill C., it is no legal excuſe; whatever conſideration ſuch a peculiar caſe as the laſt might deſerve in reſpect of puniſhment.

1 Hale, 51. 434. *Vide* poſt. ſ. 61.

§ 13. *Manner of procuring death not material. Murder, if by malice.*

The manner of procuring the death of another with malice is, generally ſpeaking, no otherwiſe material than as the degree of cruelty or deliberation with which it is accompanied may in conſcience enhance the guilt of the perpetrator; with this reſervation however, that the malice muſt be of *corporal* damage to the party. And therefore working upon the fancy of another, or treating him harſhly or unkindly, by which he dies of fear or grief, is not ſuch a killing as the law takes notice of. But he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occaſions his death, ſhall, unleſs he clearly prove the contrary, be adjudged to kill him of malice prepenſe.

Sum. 50. 1 Hale, 429. 451. 1 Hawk. ch. 31. ſ. 4. 3 Inſt. 48. 4 Blac. Com. 200.

Such was the caſe of him who carried his ſick father againſt his will in a ſevere ſeaſon from one town to another, by reaſon whereof he died; and of the harlot who being delivered

Palm. 548. 1 Leon. 327. 1 Hawk. ch. 31. ſ. 5. 6. 1 Hale, 431, 2.

Ch. V. § 19. *From particular malice to the deceaſed.*

of a child left it in an orchard covered only with leaves, in which condition it was killed by a kite: and of another who hid her child in a hogſtye, where it was devoured. Such alſo was the caſe of the pariſh officers who ſhifted a child from pariſh to pariſh, till it died for want of care and ſuſtenance.

MS. Tracy, 53. Palm. 548. 4 Blac. Com. 197.

1 Hale, 432.

One infected with the plague going abroad, whereby another catches the infection and dies, ſeems guilty of a great miſdemeanor at leaſt: and if he did it wilfully to deſtroy another, Lord Hale doubts whether it would not be murder. An infected perſon going out and converſing in company with an infectious ſore upon him, after command by the magiſtrates to remain at home, was made felony by the ſtat. 2 (vulgo) Jac. 1. c. 31. ſ. 7. 2 Jac. 1.; but that ſtatute, after having been continued for ſome time, is now expired. Yet an offence of this ſort in breach of quarantine is now made felony without clergy by the ſtat. 40 Geo. 3. c. 80.

40 Geo. 3. c. 80. *Vide poſt. Quarantine.*

Whether an indictment for murder could be maintained, for killing a female infant by raviſhing her, was made a queſtion in Ladd's caſe; but the judges to whom it was referred gave no opinion upon it, as the indictment was holden bad on another point.

Ladd's caſe, 1773, MS. Jud.

But where the death enſued rather from incautious neglect, however culpable, than from any actual malice or wilful diſpoſition to injure another, or obſtinate perſeverance in doing an act neceſſarily attended with danger, and regardleſs of the conſequences, the ſeverity of the law may admit of ſome relaxation: but the caſe muſt be ſtrictly freed from theſe latter incidents. As in the caſe of Self, who upon his apprentice returning to him from bridewell, whither he had been ſent for miſbehaviour, in a louſy and diſtempered condition, did not take that care of him which his ſituation required, and which he might have done; the apprentice not having been ſuffered to be in a bed on account of the vermin, but being made to lie on the boards for ſome time without covering and without common medical care. In this caſe the medical perſons who were examined were of opinion that the boy's death was moſt probably occaſioned by his ill-treatment in bridewell, and the want of care when he went home; and they inclined to think, that if he had been

Self's caſe, O. B. Feb. 1776. MS. Gould, J. (*Vide* Wade's caſe, O. B. Feb. 1784, p. 455. Self. Pap., and Patmore's caſe, O. B. Feb. 1789).

been properly treated when he came home he might have recovered. But though ſome harſh expreſſions were proved to have been ſpoken by the priſoner to the boy, yet there was no evidence of any perſonal violence having been uſed by the priſoner: and it was proved that the apprentice had had ſufficient ſuſtenance: and the priſoner had a general good character for treating his apprentices with humanity; and had made application to get this boy into the hoſpital. Under theſe circumſtances the Recorder left it to the jury to conſider whether his death were occaſioned by the ill-treatment he received from his maſter after returning from bridewell; and whether that ill-treatment amounted to evidence of malice, in which caſe they were to find him guilty of murder. At the ſame time they were told, with the concurrence of Mr. Juſtice Gould and Mr. Baron Hotham, that if they thought otherwiſe, yet as it appeared that the priſoner's conduct towards his apprentice was highly blameable and improper, they might under all theſe circumſtances find him guilty of manſlaughter; which they accordingly did. And upon the queſtion being afterwards put to the judges, whether the verdict were well found, they all agreed that the priſoner ſhould be burned in the hand and diſcharged (*a*).

Ch. V. § 13. *From particular malice to the deceaſed*

Eaſt. 16 Geo. 3. (abſent De Grey C. J. and Aſhurſt J.)

§ 14. *Againſt whom malice may be directed.*

Malice may be directed againſt any perſon within the king's peace. Therefore to kill an alien enemy within the kingdom is murder, unleſs in the actual heat and exerciſe of war. So to kill one attainted of felony otherwiſe than by a lawful execution; or one in a præmunire. But to kill a child in its mother's womb is no murder, but a great miſprision: and Staundford and Lord Hale are of the ſame opinion, even where the child is born alive, and afterwards dies by reaſon of the potion or bruiſes it received in the womb:

1 Hale, 433. 5 Eliz. c. 1. 3 Inſt. 50. Sum 53. 1 Hawk. ch. 31. ſ. 16. Staundf. 21. 4 Blac. Com. 198.

(*a*) I have been the more particular in ſtating the ground of the deciſion in this caſe becauſe Mr. Juſtice Gould's note of the caſe, from whence this is taken, is evidently different from another report (Leach, C. C. 127.) of the opinion of the judges in this caſe; from whence it might be collected that there could be no gradation of guilt in a matter of this ſort, where a maſter by his ill conduct or negligence had occaſioned or accelerated the death of his apprentice; but he muſt either be found guilty of murder or acquitted: a concluſion which, whether well or ill founded, certainly cannot be drawn from this ſtatement of the caſe. The ſame opinion however is ſtated in the O. B. Seſſions Papers to have been thrown out by the Recorder in Wade's caſe before referred to in the margin.

Ch. V. § 14. *From particular malice to the deceaſed.*

which opinion they ſeem to ground on the difficulty of aſcertaining the fact: certainly not a ſatisfactory reaſon, where the fact is clearly eſtabliſhed: and according to all other opinions the latter is murder.

Malice exerted againſt party abſent.
1 Hale, 431. 455. *Vide* poſt. tit. Principal and Acceſſary.

Malice may be exerted againſt a party in his abſence; as where A. lays poiſon for B. in his victuals, which B. afterwards takes and dies. So where A. procures an ideot or lunatic to kill B., which he does. In both inſtances A. is guilty of the murder as principal, and B. is merely an inſtrument.

Keilw. 136. 1 Hale, 431. 1 Hawk. ch. 27. ſ. 6.

If one perſuade another to kill himſelf, the adviſer is guilty of murder. The ſame, if he kill the party by his own command.

§ 15. *Malice againſt Baſtards.*

One kind of wilful murder upon expreſs malice deſerves particular notice; becauſe on account of the difficulty attendant upon the proof of the fact the legiſlature have thought it neceſſary to make ſpecial proviſion for facilitating the detection of it.

21 Jac. 1. c. 27. made perpetual by 16 Car. 1. c. 4.

By the ſtat. 21 Jac. 1. c. 27. it is enacted, "that if any "woman be delivered of any iſſue of her body, which being "born alive ſhould by the laws of this realm be a baſtard; "and that ſhe endeavour privately either by drowning or "ſecret burying thereof, or any other way, either by herſelf "or the procuring of others, ſo to conceal the death thereof, "as that it may not come to light whether it were born "alive or not, but be concealed: in every ſuch caſe the "ſaid mother ſo offending ſhall ſuffer death as in caſe of "murder, except ſhe can prove by one witneſs at the leaſt, "that the child whoſe death was by her ſo intended to be "concealed was born dead."

2 MS. Sum. 488. Kel. 32, 3. 2 Hawk. ch. 46. ſ. 43. *Vide* poſt. f. 120.

This, being a very ſevere law, has been always conſtrued moſt favourably for the unfortunate object of accuſation. If ſhe called for help, or confeſſed herſelf with child, ſhe is not within the conſtruction of the ſtatute; and then it will lie on the proſecutor to prove that the child was born alive and murdered. Upon the ſame principle evidence is always allowed of the mother's having made proviſion for the birth, as a circumſtance to ſhew that ſhe did not intend to conceal it. Again, if the child be born before its time, which is to be collected

O. B. Dec. 13, 1689.

2 Hale, 289.

collected from circumſtances, as if it have no hair, or nails, this is preſumptive evidence that it was born dead; but it muſt be left to the jury upon all the circumſtances of the caſe. At all events if there be no concealment proved, the caſe ſtands as at common law; and the woman is not put to the abſolute neceſſity of proving that the child was born dead. And even the preſence of an accomplice has been holden to take the caſe out of the ſtatute. Jane Peat was indicted for the murder of her baſtard child, and Margaret Peat her mother was indicted at the ſame time for being preſent aiding and abetting. It appeared that the priſoner Jane when in labour was heard by perſons in an adjoining room to call to her mother, who was preſent with her. Heath J. held that this took the caſe out of the ſtatute; for if any perſon be preſent, although privy to the guilt, there can be no concealment by the mother within the ſtatute, and the caſe ſtands as at common law. And there being no evidence of guilt but the concealment by both the priſoners, they were acquitted by his direction. Mr. Juſtice Blackſtone ſays further, that it has been uſual of late years, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption, that the child whoſe death is concealed was therefore killed by its parent, is admitted to convict the priſoner.

Ch. V. § 15. *From particular malice to the deceaſed.*

Baſtards.

Rex v. Jane Peat, Exeter Sum. Aſſ. 1793. Poſt. f. 119. *Vide* Domat. liv. 3. tit. 6. f. 4. a ſimilar law temp. Hen. 3.

4 Blac. Com. 198. Mary Jefford's caſe, Exeter Sp. Aſſ. 1798. cor. Thomſon, B. S. P. *Vide* poſt. f. 119. for the form of the indictment.

§ 16. *Felo de ſe.*

Malice may alſo be directed to the deſtruction of a man's own life, which denominates the party felo de ſe: that is, where any perſon wilfully does any act to deſtroy himſelf, and is thereby killed. If A. kill B. at his own deſire, B. is not felo de ſe, becauſe his conſent was merely void; but where two agree to die together, and one prepares poiſon of which they both drink, and he who prepared it ſurvives, the other who dies is felo de ſe; becauſe the act of taking the poiſon was his own, though the other aſſiſted him in getting it.

1 Hale, 411. Ante, f. 5. 1 Hawk. ch. 27. f. 6. *Vide* Moor. 754.

Ch. V. § 17.

2. *Homicide from a particular Malice to one, which falls by Miſtake or Accident upon another.*

§ 17. *Malice to one which falls on another.*

In theſe caſes the act done follows the nature of the act intended to be done. Therefore if the latter were founded in malice, and the ſtroke from whence death enſued fell by miſtake or accident upon a perſon for whom it was not intended, yet the motive being malicious, the act amounts to murder; or to petit treaſon, according to the relative ſituation of the parties.

Sum. 50. 1 Hale, 379. 442 466. Dyer, 128. Kel. 111, 112. 117. Pult. de Pace, 124. b. Foſt. 261. *Vide* poſt. f. 27. 32.

Thus A. having malice againſt B., ſtrikes at and miſſes him, but kills C.; this is murder in A.: and if it had been without malice, but with an inſtrument or in a manner calculated to create danger, though not likely to kill, it would have been manſlaughter. Again, A. having malice againſt B., aſſaults him, and kills C. the ſervant of B., who had come in aid of his maſter: this is murder in A.; for C. was juſtified in attacking A. in defence of his maſter, who was thus aſſaulted. So if A. give a poiſoned apple to B., intending to poiſon her, and B. ignorant of it give it to a child, who takes it and dies; this is murder in A., but no offence in B.; and this, though A. who was preſent at the time endeavoured to diſſuade B. from giving it to the child.

1 Hale, 438.

1 Hale, 431. 436. 1 Hawk. ch. 31. ſ. 42.

1 Hale, 429.

Hither alſo may be referred the caſe of one who gave medicine to a woman; and that of another who put ſkewers in her womb, with a view in each caſe to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it ſucceeded, would not have been ſo, but only a great miſdemeanor: for the acts were in their nature malicious and deliberate, and neceſſarily attended with great danger to the perſon on whom they were practiſed.

Mary Tinkler's caſe, 6th Nov. 17[illegible], by all the judges. Mr. Gould J. Foſt. ſ. 124.

1 Hale, 413. 1 Hawk. ch. 27. ſ. 4.

Alſo, if a man in attempting to kill another, miſs his blow and kill himſelf; or intending to ſhoot at another, the gun burſt and mortally wound himſelf; he is felo de ſe; for he is the only agent. It is alſo ſaid, that if A. aſſault B. falling down *with his knife drawn*, A. in purſuit to kill B. by haſte fall on the knife and be killed, A. is felo de ſe. But Lord Hale in his Pleas of the Crown ſeems to doubt that,

Sum 28. Dalt ch. 144. 3 Inſt. 54.

1 Hale, 413.

and

and ſays, the authorities relied on do not ſupport the poſition, for they only determine, and that rightly, that B. is not guilty at all, and not merely ſe defendendo; and that A. is not a felo de ſe, but it is only homicide by miſadventure. Ch. V. § 17. *From malice to one which falls on another.*

On the other hand, if the blow intended againſt one, and lighting upon another, aroſe from a ſudden tranſport of paſſion, on a reaſonable provocation, which in caſe the one had died by it would have reduced the offence to manſlaughter; the fact will admit of the ſame alleviation if the other ſhould happen to fall by it. Foſt. 262. Brown's caſe, poſt. ſ. 27. 1 Hawk. ch. 31. ſ. 44.

3. *Homicide from a general Malice or depraved Inclination to Miſchief, all where it may.* § 18. *General malice.*

The act itſelf muſt be unlawful, attended with probable ſerious danger, and muſt be done with a miſchievous intent to hurt people, in order to make the killing amount to murder in theſe caſes: for it is from theſe circumſtances that the malice is to be inferred. But if an unlawful and dangerous act, manifeſtly ſo appearing, be done deliberately, the miſchievous intent will be preſumed, unleſs the contrary be ſhewn. 1 Hale, 475. Foſt. 261.

Thus, if a perſon, breaking in an unruly horſe, wilfully ride him among a crowd of perſons, the probable danger being great and apparent, and death enſue from the viciouſneſs of the animal, it is murder. For how can it be ſuppoſed that a perſon wilfully doing an act, ſo manifeſtly attended with danger, eſpecially if he ſhewed any conſciouſneſs of ſuch danger himſelf, ſhould intend any other than the probable conſequence of ſuch an act. But yet if it appear clearly to have been done heedleſsly and incautiouſly only, and not with an intent to do miſchief, it is only manſlaughter: though Hawkins conſiders that it would be murder if the perſon intended to divert himſelf with the fright of the crowd. So if a man, knowing that people are paſſing along the ſtreet, throw a ſtone likely to create danger, or ſhoot over the houſe or wall, with intent to do hurt to people, and one is thereby ſlain; it is murder, on account of the previous malice, though not directed againſt any particular individual: for it is no excuſe that the party was bent upon miſchief 1 Hale, 476. 4 Blac. Com. 200. 1 Hawk. ch. 29. ſ. 12. ch. 31. ſ. 61. Poſt. ſ. 38, &c. 1 Hale, 475. Sum. 45. Foſt. 261. 1 Ld. Ray. 143. Hawk. *ut ſupra.* 1 Hale, 475.

Ch. V. § 18. *From general malice.*

generally. But if the act were done incautiouſly, without any ſuch intent, which muſt be collected from the circumſtances, it is only manſlaughter.

4 Blac. Com. 200. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 46. *Vide* tit. Principal and Acceſſary.

Again; if in the proſecution of an unlawful act the party come with a general reſolution to reſiſt all oppoſers; as to commit a riot, to enter a park, &c. if death enſue upon ſuch reſiſtance, it will be murder. But this will be conſidered more fully in another place.

§ 19. II. *Of Homicide from Tranſport of Paſſion, or Heat of Blood.*

General principles and diviſion of ſubject.

Herein is to be conſidered under what circumſtances it may be preſumed that the act done, though intentional of death or great bodily harm, was not the reſult of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone.

Upon this head it is principally to be obſerved, that whenever death enſues from ſudden tranſport of paſſion or heat of blood, if upon a reaſonable provocation and without malice, or if upon ſudden combat, it will be manſlaughter: if without ſuch provocation, or the blood has had reaſonable time or opportunity to cool, or there be evidence of expreſs malice, it will be murder. For let it be again obſerved, that in no inſtance can the party killing alleviate his caſe by referring to a previous provocation, if it appear by any means that he acted upon expreſs malice. It becomes then material to conſider,

Ante, ſ. 12. Oneby's caſe, 2 Ld. Ray 1450.

1. What is a ſufficient provocation, and up to what extent, to extenuate the guilt of homicide. 2. How far the law regards heat of blood in mitigation of homicide, independent of the queſtion of reaſonable provocation; as in caſes of mutual combat. 3. What caſes are affected by the ſtatute 1 Jac. c. 8., commonly called the ſtatute of ſtabbing. 4. How long the law will allow for the blood being heated under the circumſtances, and what ſhall be conſidered as evidence of its having cooled, before the mortal blow given.

1. Words

§ 20.

1. Words of reproach, how grievous ſoever, are not provocation ſufficient to free the party killing from the guilt of murder; nor are contemptuous or inſulting actions or geſtures without an aſſault upon the perſon; nor is any treſpaſs againſt lands or goods. This rule governs every caſe where the party killing upon ſuch provocation made uſe of a deadly weapon, or otherwiſe manifeſted an intention to kill, or to do ſome great bodily harm. But if he had given the other a box on the ear, or had ſtruck him with a ſtick or other weapon *not likely to kill*, and had unluckily and againſt his intention killed him, it had been but manſlaughter: for no malignant intention can be collected from ſuch acts.

What is a ſufficient provocation. Foſt. 290. 1 Hale, 455, 6. 1 Hawk. ch. 31. ſ. 33. Kel. 55. 130, 1. 4 Blac. Com. 200. Rex v. Kidd, 5 St. Tr. 296. Mawgridge's caſe, 9 St. Tr. 64. Ld. Morley's caſe, 7 St. Tr. 423. Cro. Eliz. 778. Poſt. ſ. 22.

It is indeed ſaid by Lord Hale, that it was reſolved in Lord Morley's caſe that words of menace of bodily harm are a ſufficient provocation to reduce the offence of killing to manſlaughter. In the report of the ſame caſe in Kelyng, no ſuch poſition is to be found. And it ſeems that they ought at leaſt to be accompanied by ſome act denoting an immediate intention of following them up by an actual aſſault. 1 Hale, 456. Kel. 55.

Aſſault. Kel. 135. 4 Blac. Com. 191.

But any aſſault made with violence or circumſtances of indignity upon a man's perſon, as by pulling him by the noſe, if it be reſented immediately by the death of the aggreſſor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manſlaughter. So, ſays Lord Hale, it would be, if A. riding on the road, B. had whipped his horſe out of the track, and then A. had alighted and killed B. The particulars of the caſe are not explained; but I ſhould preſume that the fact was done with violence or great inſolence. Lanure's caſe, 17 Car. 1. 1 Hale, 456.

Reſtraint of liberty. Buckner's caſe, Styl. 467. Poſt. 1. 29. Withers's caſe, Stafford Sum. Aſſ. 1784, cor. Buller J. afterwards before all the judges in M. 25 Geo. 3. MS. Gould and Buller, Js.

So if a man be injuriouſly reſtrained of his liberty; as where a creditor ſtood at the door of his debtor with a drawn ſword, to prevent him from eſcaping while he ſent for a bailiff to arreſt him. Or, as where a ſerjeant put a common ſoldier under an arreſt, who thereupon killed the ſerjeant with a ſword: and upon the trial the articles of war were not produced, nor any evidence given of the uſage of the army, and ſo no authority in the ſerjeant appeared.

There

Ch. V. § 20. *What provocation may extenuate.*

Detecting adulterer. Foſt. 296. 1 Hale, 486. Poſt. ſ. 29.

There is indeed one ſpecies of provocation, which though it do not amount to a perſonal aſſault upon the party himſelf, is yet of ſo grievous a nature as the law reaſonably concludes cannot be borne in the firſt tranſport of paſſion; where the injury is irreparable and can never be compenſated. This is where a man finds another in the act of adultery with his wife; in which caſe if he kill him in the firſt tranſport of paſſion, he is only guilty of manſlaughter, and that too of the loweſt degree; and therefore the Court directed the burning in the hand to be gently inflicted, becauſe there could not be a greater provocation. But if he had killed the adulterer deliberately and upon revenge, it would be murder.

Manning's caſe, T. Ray. 212. 1 Ventr. 159.

§ 21. *A trivial aſſault no provocation for cruel revenge.* Foſt. 291. 4 Blac. Com. 199. 201.

It muſt not however be underſtood that any trivial provocation, which in point of law amounts to an aſſault, or even a blow, will of courſe reduce the crime of the party killing to manſlaughter. This I know has been ſuppoſed by ſome, but there is no authority for it in the law. For where the puniſhment inflicted for a ſlight tranſgreſſion of any ſort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be conſidered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true ſymptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithſtanding ſuch provocation. Barbarity, ſays Lord Holt in Keate's caſe, will often make malice.

Comb. 408.

Stedman's caſe, O. B. Seſſions before Eaſter term 1704. MS. Tracy and Denton, 57. Foſt. 292. S. C.

The caſe of Stedman will illuſtrate this in both points of view. The priſoner, who was a ſoldier, was indicted for the murder of one Macdonel a woman. It appeared that a friend of the deceaſed being fighting with another in Covent Garden, and the priſoner running towards them, the woman ſaid to him, "you will not murder the man, will you?" Stedman replied, "what is that to you, you bitch," upon which the woman gave him a box on the ear, and then Stedman ſtruck her with the pomel of his ſword on her breaſt: thereupon ſhe fled, and he purſued and ſtabbed her in the back with his ſword. It ſeemed to

Holt

Holt C. J. that this was murder; the box on the ear by the woman not being a ſufficient provocation for the killing her in that manner, and after he had given her the blow in return for the box on the ear: and it was agreed to have this found ſpecially by the opinion of all the judges there. But it afterwards appearing in the progreſs of the trial, that the woman had ſtruck the ſoldier with a patten on the face with great force, ſo that the blood flowed, it was holden clearly to be only manſlaughter. The ſmart of the wound, ſays Mr. Juſtice Foſter, and the effuſion of blood might poſſibly keep his indignation boiling to the moment of the fact. Foſt. 292.

Ch. V. § 22. *What provocation may extenuate.*

So a ſlight blow with a cane would not in the opinion of the laſt-mentioned learned judge have juſtified the officers who came to arreſt Mr. Luttrell, in diſpatching him in the inhuman manner reported by Sir John Strange; two of them having, as he ſtates, upon the receipt of ſuch a blow, ſtabbed him in ſeveral places while he lay helpleſs on the ground, begging for mercy, and then diſpatched him with a piſtol: becauſe ſuch furious acts of revenge inflicted upon trivial provocations are true ſymptoms of that malice which conſtitutes the crime of murder. Ib. 293. Rex v. Reaſon and Tranter, 1 Stra. 499. Poſt. f. 86. S. C. more fully ſtated.

So if on any ſudden provocation of a ſlight nature, one beat another in a cruel and unuſual manner, ſo that he dies, though he did not intend to kill him, it is murder by expreſs malice. 4 Blac. Com. 199.

§ 22. *Smaller provocations may extenuate, unleſs revenged cruelly or with dangerous inſtruments.*

There are ſeveral inſtances of ſmaller provocations not amounting to an aſſault upon the perſon, which may yet tend to extenuate the guilt of homicide; or to ſpeak more properly, they ſerve to explain the act and rebut the preſumption of malice. Wherein however it muſt again be obſerved, that the puniſhment muſt not be greatly diſproportionate to the offence. And herein much depends upon the inſtrument or manner of chaſtiſement: if the inſtrument be ſuch in its nature as was likely to endanger life, as a peſtle, the party killing will ſtill be guilty of murder. But if it be not of a deadly nature; nor urged with brutal violence; in ſhort, if the act may fairly be attributed to an intention to correct rather than to a cruel and implacable malice, Ante, f. 21. Foſt. 291. MS. Burnet, 44. Kel. 131. 1 Hale, 457. 4 Blac. Com. 200. 1 Hawk. ch. 31. f. 34.

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malice, founded in a ſpirit of revenge, it will amount only to manſlaughter.

Foſt. 291. 1 Hale, 473. 1 Hawk. ch. 31. ſ. 34. Kel. 132. Poſt. ſ. 56.

A. finding a treſpaſſer on his land, in the firſt tranſport of his paſſion beat him, and unluckily happened to kill him: this was holden to be manſlaughter. But it muſt be underſtood that he beat him not with a miſchievous intention to injure him materially, but merely to chaſtiſe for the treſpaſs, and deter him from repeating the like; and it muſt ſo appear. For if he had knocked his brains out with a bill or hedge-ſtake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a ſudden reſentment, whereof he had died, it had been murder.

R. v. John Fray, O. B. Seſſ. 1785, cor. Gould, J. Seſſ. Papers, No. 751.

Where one, having had his pocket picked, ſeized the offender, and being encouraged by a concourſe of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned; this was ruled to be manſlaughter only.

1 Hale, 456.

On words of provocation a man threw a broomſtick at a diſtance at another, and killed her; and the judges not being unanimous, a pardon was adviſed. The doubt there muſt have been upon the ground that the inſtrument was not ſuch as could probably at the given diſtance have occaſioned death or great bodily harm.

Sarah Hazel's caſe, B. R. Eaſt. 25 Geo. 3. MS.

A ſimilar doubt occurred in Sarah Hazel's caſe, on an indictment for murder. It was found upon a ſpecial verdict, that ſhe had directed her daughter-in-law, a child of ten years old, to ſpin ſome yarn; and upon her return home finding ſome of it badly done, ſhe threw a four legged ſtool at the child, and ſtruck her on the right temple, of which the child ſoon after died. The jury found alſo, that the ſtool was of ſufficient ſize and weight to give a mortal blow, *but that the priſoner when ſhe threw it did not intend to kill the deceaſed.* That ſhe afterwards threw the body into a river, and told her huſband that the child was loſt. After argument in B. R., (where ſeveral formal objections were taken to the finding,) the caſe for the difficulty of it was referred to the conſideration of all the judges; but no opinion was ever delivered, as ſome of the judges thought it a proper caſe to recommend for a pardon.

On

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On the argument of the above caſe, the priſoner's counſel cited a caſe tried at Norwich aſſizes in 1782, before Nares J. where it appeared that the priſoner, a ſhepherd, being angry with his boy for letting ſome ſheep eſcape, in his paſſion threw a hedge ſtake at him with ſome violence, at the diſtance of about eight or ten yards, which unfortunately killed him; and it was ruled to be only manſlaughter.

Halloway's caſe, Cro. Car. 131. Palm. 545. W. Jones, 198. 1 Hawk. ch. 31. ſ. 39. 1 Hale, 454-473. Kel. 127.

A parker finding a boy ſtealing wood in his maſter's ground bound him to his horſe's tail, and beat him. The horſe took fright and ran away, and dragged the boy on the ground till his ſhoulder was broken, whereof he died. This was ruled murder. For it was not only an illegal, but a deliberate and dangerous act; the correction was exceſſive, and ſavoured of cruelty. But if the chaſtiſement had been more moderate, it had been but manſlaughter. For between perſons nearly connected together by civil or natural ties, the law admits the force of a provocation done to one to be felt by the other: and therefore a fortiori, if the owner or maſter himſelf had caught the treſpaſſer and beat him in ſuch a manner as ſhewed a deſire only to chaſtiſe and prevent a repetition of the offence, but had unfortunately and againſt his intent killed him; it would only have been manſlaughter.

Rowley's caſe, 12 Rep. 87. 1 Hale, 453. Foſt. 294.

Rowley's caſe, as reported by Lord Coke, from whom Lord Hale cites it, was this: The priſoner's ſon fought with another boy and was beaten; he ran home to his father all bloody; who preſently took a cudgel, ran three quarters of a mile, and ſtruck (*a*) the other boy, who died. This was ruled manſlaughter, becauſe done in ſudden heat and paſſion. Upon which caſe Mr. Juſtice Foſter obſerves, that the provocation was not very grievous: the boy had fought with one who happened to be an over match for him, and was worſted, a diſaſter ſlight enough, and very frequent among boys. And therefore he is of opinion, that if upon ſuch a provocation the father, after running three quarters

(*a*) The words of Lord Hale are in the preſent tenſe. It muſt be obſerved that Mr. Juſtice Foſter's words in citing this caſe are "*beats* the other boy, who dieth of this beating." The reaſon for adverting to this difference will appear. The words in Lord Coke's report are, "ſtruck him upon the head, upon which he died."

of

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of a mile, had ſet his ſtrength againſt the child, and had diſpatched him with an hedge ſtake, or any other deadly weapon, or by repeated blows with his cudgel, it muſt have been murder; ſince any of theſe circumſtances would have been a plain indication of malice, or a vindictive motive. But he obſerves that Croke reports the true grounds of the judgment: his words are, "Rowley ſtruck the child with *a little cudgel* *, of which ſtroke he afterwards died." From whence it may be very fairly collected, that the accident happened by a *ſingle ſtroke with a cudgel not likely to kill him.* Such a provocation therefore, though it might palliate a moderate chaſtiſement from the hand of a parent, whoſe paſſion might be ſuppoſed to be raiſed at the ſight of his child in the condition he was then in, yet would not have ſufficed as any manner of alleviation for an act of brutal violence; more eſpecially as the act which occaſioned his reſentment was over, and ſome time had elapſed before he could reach the object of it.

Cro. Jac. 296.

* Godb. 182. ſays, "a rod."

Ante, f. 12. and *vide* Maſon's caſe, poſt. 239.

It has alſo been ſhewn, that in ſome caſes not even previous blows or ſtruggling will extenuate homicide, if it expreſsly appear to have been committed upon malice.

Poſt. f. 62, &c.

With reſpect to provocations ariſing out of injuries done to others by officers of juſtice, or ſuch as act in that character, they will claim ſeparate conſiderations hereafter: as will

f 37.

alſo thoſe caſes of homicide ariſing from exceſs of correction in foro domeſtico.

§ 23. *a.* *Reſult of the caſes on extenuating provocations.*

In all the inſtances above enumerated the party killing is ſuppoſed to have taken all advantages in the heat of blood over the perſon ſlain; but to have received ſuch a provocation as the law preſumes might in human frailty heat the blood to a proportionable degree of reſentment, and keep it boiling to the moment of the fact: ſo that the party may rather be conſidered as having acted under a temporary ſuſpenſion of reaſon, than from any deliberate malicious motive. And it has been ſhewn, that in the caſe of a legal provocation, ſtrictly ſo conſidered, this heat will extenuate the guilt of the party acting under its adequate influence, even though he made uſe of a deadly weapon. The ſame extenuation will apply even to leſſer provocations, where the inſtrument

inſtrument or force, not being in their own nature dangerous, were ſo applied as to induce a reaſonable preſumption that correction and not deſtruction were intended to be effected. It has alſo been more than once obſerved, that the puniſhment inflicted upon any ſort of provocation, whether in its nature admitted by law to be ſuch, or taken only as explanatory of the act done, muſt not greatly exceed the offence received. This has been urged with caution; becauſe in thoſe caſes where the mercy of the law interpoſes in pity to human frailty, it will not try the culprit by the rigid rule of juſtice, and examine with the moſt ſcrupulous nicety whether he cut off the exact pound of fleſh. But let it be remembered on the other hand, that whoſoever takes the diſpenſation of puniſhment into his own hand does it at his peril; and if it be found that inſtead of puniſhment he executed vengeance untempered with mercy, he can have no reaſon to complain if his excuſe for ſuch diſpenſation be more ſcrupulouſly balanced in the ſcale of juſtice.'

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Ante, f. 21, 22. and *vide* poſt. f. 30.

In no caſe however will the plea of provocation avail the party, if it were ſought for and induced by his own act in order to afford him a pretence for wreaking his malice. As where A. and B. having fallen out, A. ſays he will not ſtrike, but will give B. a pot of ale to touch him; on which B. ſtrikes, and A. kills him: this is murder.

§ 23. *b.* *Provocation will not avail if ſought.* 1 Hale, 457. 1 Hawk. ch. 31. f. 24. 2 Ld. Ray. 1496. 2 Stra. 773.

And in all caſes of provocation, in order to extenuate the offence, it muſt appear that the party killing acted upon ſuch provocation, and not upon an old grudge; for then it would amount to murder.

1 Hale, 452. Ante, f. 11, 12. 19. *nor if death on old grudge.*

Richard Maſon was indicted and convicted for the wilful murder of William Maſon his brother; but execution was reſpited to take the opinion of the Judges, upon a doubt whether upon the circumſtances given in evidence the offence amounted to murder or manſlaughter. The priſoner with the deceaſed and ſome neighbours were drinking in a friendly manner at a public houſe; till growing warm in liquor, but not intoxicated, the priſoner and the deceaſed began in idle ſport to puſh each other about the room. They then wreſtled one fall; and ſoon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either ſide,

Rd. Maſon's caſe, Winc eſter Sum. Aſſ. 1756. Foſt. 132. *Even blows previouſly received will not extenuate homicide upon deliberate malice and revenge; eſpecially where it is to be collected from the circumſtances that the provocation was ſought for the purpoſe of colouring the revenge.*

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ſide, till the priſoner in the cudgel play gave the deceaſed a ſmart blow on the temple. The deceaſed thereupon grew angry, and throwing away his cudgel, cloſed in with the priſoner, and they fought a ſhort time in good earneſt: but the company interpoſing, they were ſoon parted. The priſoner then quitted the room in anger; and when he got into the ſtreet was heard to ſay, "Damnation ſeize me if I do not fetch ſomething and ſtick him;" and being reproved for ſuch expreſſions, he anſwered, "I'll be damned to all eternity if I do not fetch ſomething and run him through the body." The deceaſed and the remainder of the company continued in the room where the affray happened; and in about half an hour the priſoner returned, having in the mean time changed a ſlight for a thicker coat. The door of the room being open into the ſtreet, the priſoner ſtood leaning againſt the door-poſt, his left hand in his boſom, and a cudgel in his right; looking in upon the company, but not ſpeaking a word. The deceaſed ſeeing him in that poſture invited him into the company; but the priſoner anſwered, "I will not come in." "Why will you not?" ſaid the deceaſed. The priſoner replied, "Perhaps you will fall on me and beat me." The deceaſed aſſured him he would not; and added, "Beſides, you think yourſelf as good a man as me at cudgels, perhaps you will play at cudgels with me." The priſoner anſwered, "I am not afraid to do ſo if you will keep off your fiſts." Upon theſe words the deceaſed got up and went towards the priſoner, who dropped the cudgel as the deceaſed was coming up to him. The deceaſed took up the cudgel, and with it gave the priſoner two blows on the ſhoulder. The priſoner immediately put his right hand into his boſom, and drew out the blade of a tuck ſword, crying, "Damn you, ſtand off or I'll ſtab you;" and immediately, without giving the deceaſed time to ſtand off, made a paſs at him with the ſword, but miſſed him. The deceaſed thereupon gave back a little, and the priſoner, ſhortening the ſword in his hand, leaped forward towards the deceaſed, and ſtabbed him to the heart; and he inſtantly died. The Judges at a conference in Michaelmas vacation unanimouſly agreed, that there are in this caſe ſo many circumſtances of deliberate malice and deep revenge

revenge on the defendant's part, that his offence cannot be leſs than wilful murder. He vowed he would fetch ſomething to ſtick the deceaſed, to run him through the body. He returned to the company provided to appearance with an ordinary cudgel, as if he intended to try ſkill and manhood a ſecond time with that weapon; but the deadly weapon was all the time carefully concealed under his coat; which moſt probably he had changed for the purpoſe of concealing the weapon. He ſtood at the door, refuſing to come nearer, but artfully drew on the diſcourſe of the paſt quarrel; and as ſoon as he ſaw his brother diſpoſed to engage a ſecond time at cudgels, he dropped his cudgel and betook himſelf to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother ſtand off; but he gave him no opportunity of doing ſo before the firſt paſs was made. His brother retreated before the ſecond, but he advanced as faſt, and took the revenge he had threatened. The circumſtance of the blows before the ſword was produced, which it may be preſumed ſuggeſted the doubt, did not alter the caſe, nor did the precedent quarrel; becauſe, all circumſtances conſidered, he appeared to have returned with a deliberate reſolution to take a deadly revenge for what had paſſed; and the blows were plainly a provocation *ſought* on his part, that he might execute the wicked purpoſe of his heart with ſome colour of excuſe.

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2. But there is another claſs of caſes, where the degree or ſpecies of provocation enters not ſo deeply into the merits of them as in the foregoing: and thoſe are, where upon words of reproach, or indeed any other ſudden provocation, the parties come to blows, and a combat enſues, no undue advantage being taken or ſought on either ſide: if death enſue, this amounts to manſlaughter. And here it matters not what the cauſe be, whether real or imagined, or who draws or ſtrikes firſt; provided the occaſion be ſudden, and not urged as a cloak for pre-exiſting malice. For in no caſe will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. Nothing can be more dangerous or unjuſt in matters of this high nature, than to eſtabliſh material diſtinctions upon points which do not enter into the intrinſic merits of the caſe. Where parties upon a

§ 24. *Death on mutual combat.*
Ante, f. 19.
Foſt. 295.
Kel. 135.
2 Ld. Ray. 1493.
1 Hale, 453. 456.
Poſt. f. 51. &c.
Staunf 15.
Crompt. 28.
1 Keb. 17.

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ſudden quarrel agree to fight, how little does it matter, as to the point of offence, which makes the firſt aſſault; it is often purely accidental; the guilt conſiſts in the pre-conceived malice or anger againſt the party, which induces ſo unlawful an agreement. And therefore where two perſons deliberately agree to fight, and meet for that purpoſe, and one is killed; the other cannot help himſelf by alleging that he was firſt ſtricken by the deceaſed, or that he had often declined to meet him and was urged by importunity, or that he meant not to kill, but only to diſarm his adverſary: for ſince he deliberately engaged in an act highly culpable in defiance of the laws, he muſt at his peril abide the conſequences. And here it may be noted, that where the principal in deliberate duelling would be guilty of murder, ſo will his ſecond; and, as ſome have conſidered, the ſecond alſo of him who died, becauſe the fighting was upon a compact; though Lord Hale thinks the latter opinion too ſevere; but he ſays, it is a great miſdemeanor even in him.

Deliberate duelling.
1 Hawk. ch. 31. ſ. 21.
1 Hale, 452, 3.
Ante, ſ. 22.

1 Hawk. ch. 31. ſ. 31. 1 Hale, 441. 443. 453. 4 Blac. Com. 199. 11 St. Tr. 114. Coſmo Gordon's caſe, O. B. Sept. 1784, Seſſ. Pap. 2043. Poſt. ſ. 59.

§ 25. *Equality of combat neceſſary to extenuate.*

I have before ſtated, that in the caſe of mutual combat, in order to ſave the party making the firſt aſſault upon an inſufficient legal provocation from the guilt of murder, the occaſion muſt not only be ſudden, but the party aſſaulted muſt be put upon an equal footing in point of defence, at leaſt at the onſet. This is peculiarly requiſite where the attack is made with deadly or dangerous weapons.

Poſt. 295. 1 Hale, 456. Kel. 61. 2 Ld. Ray. 1493. 1 Hawk ch. 31. ſ. 27, 28.

A. uſes provoking language or behaviour towards B., who thereupon ſtrikes him, and a combat enſues, wherein A. is killed; held manſlaughter; for it was a ſudden affray, and they fought upon equal terms. But if B. had drawn his ſword and made a paſs at A., whoſe ſword was then undrawn, and thereupon A. had drawn and a combat had enſued, in which A. had been killed; this would have been murder. For B. by making his paſs while his adverſary's ſword was undrawn ſhewed that he ſought his blood; and A.'s endeavouring to defend himſelf, which he had a right to do, will not excuſe B. But if B. had firſt drawn, and forborne till his adverſary had alſo drawn, it had been no more than manſlaughter.

Mawgridge,

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Mawgridge's caſe, Kel. 128. 2 Ld. Ray. 1489. Foſt. 296. Poſt. f. 47. S.C.

Vide Oneby's caſe, poſt. f. 30.

Mawgridge, upon words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his ſword. Mr. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him; whereupon Mawgridge ſtabbed Cope; which was ruled to be murder. For Mawgridge in throwing the bottle ſhewed an intention to do ſome great miſchief, and his drawing immediately ſhewed that he intended to follow up his blow.

Ford's caſe, Kel. 51.

Vide poſt. f. 47.

And upon the ſame principle it ſeems to me that Ford's caſe, as reported, might be defenſible; who being in poſſeſſion of a room at a tavern, ſeveral perſons inſiſted upon having it, and turning him out, which he refuſed to ſubmit to: thereupon they drew their ſwords upon Mr. Ford and his company, and Mr. Ford drew his ſword and killed one of them; which was adjudged juſtifiable homicide. Now though the aſſailants waited till Mr. Ford had drawn his ſword, which does by no means appear; yet if more than one attacked him at the ſame time [and as he was the only one of his party who ſeems to have reſiſted, it is probable enough that ſuch was the caſe]; with great deference to thoſe (*a*) who have doubted the law of this caſe, the determination ſeems to be maintainable. If on ſuch an attack Mr. Ford had been killed, it would clearly have been murder: and therefore it may be preſumed that the memorandum in the margin of the reporter, and the quære by the commentator, muſt have been made on the ground of the reaſon ſuggeſted in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford *in defence of his own poſſeſſion of the room* was *juſtifiable*, which under thoſe circumſtances may be fairly queſtioned. On that ground indeed it might have been better ruled to be manſlaughter.

§ 26. *Sufficient if the combat be equal at the onſet.*

The caſe will not be varied if, on any ſudden quarrel, blows paſs, without any intention to kill or injure another materially; and in the courſe of the ſcuffle, after the parties are heated by the conteſt, one kill the other with a deadly weapon.

(*a*) Mr. Juſtice Foſter in citing this caſe, p. 274, has put a quære to it; and in the margin of Kelyng there is a memorandum to inquire of it.

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Rex v. Taylor, 5 Burr. 2793.

Three Scotch ſoldiers were drinking together in a public houſe; ſome ſtrangers in another box abuſed the Scotch nation, and uſed ſeveral provoking expreſſions towards the ſoldiers; on which one of them, the priſoner, ſtruck one of the ſtrangers with a ſmall rattan cane, not bigger than a man's little finger. The ſtranger went out for aſſiſtance; and in the mean time an altercation enſued between the priſoner and the deceaſed, who then came into the room, and who, on the priſoner's offering to go without paying his reckoning, laid hold of him by the collar and threw him againſt a ſettle. The altercation encreaſed; and when the ſoldier had paid the reckoning the deceaſed again collared him, and ſhoved him from the room into the paſſage. Upon this the ſoldier exclaimed, that he did not mind killing an Engliſhman more than eating a meſs of crowdy. The deceaſed, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe: whereupon the latter inſtantly turned round, drew his ſword, and ſtabbed the deceaſed to the heart: adjudged manſlaughter.

Snow's caſe, Northampton Sum. Aſſ. 1776, MS. Crown Caſ. Res. and MS. Gould J. Leach, 138. S. C.

William Snow was indicted for the murder of Thomas Palmer. The priſoner, who was a ſhoemaker, lived in the neighbourhood of the deceaſed. One evening the priſoner, who was much in liquor, paſſed accidentally by the houſe of the deceaſed's mother, near which the deceaſed was at work, had a quarrel with him there, and after high words they were going to fight, but were prevented by the mother, who hit the priſoner in the face and threw water over him. The priſoner went into his houſe, but came out in a few minutes, and ſet himſelf down upon a bench before his gate, with a ſhoemaker's knife in his hand, paring a ſhoe. The deceaſed on finiſhing his work, returned home by the priſoner's houſe, and called out to him as he paſſed, "Are not you an aggravating raſcal?" The priſoner replied, "What will you be when you are got from your maſter's feet:" on which the deceaſed took the priſoner by the collar, and dragging him off the bench, they both rolled into the cartway. While they were ſtruggling and fighting, the priſoner underneath the deceaſed, the latter cried out, "you rogue what do you do with that knife in your hand," and caught at his arm to ſecure it;

but the priſoner kept his hand ſtriking about, and held the deceaſed ſo hard with his other hand that he could not get away. The deceaſed, however, at length made an effort to diſengage himſelf, and during the ſtruggle received the mortal wound in his left breaſt, having before received two ſlight wounds. The jury found the priſoner guilty of murder. But judgment was reſpited to take the opinion of the judges; who [in the abſence of De Grey C. J.] were unanimouſly of opinion that it was only manſlaughter. They thought that there was not ſufficient evidence that the priſoner lay in wait for the deceaſed, with a malicious deſign to provoke him, and under that colour to revenge his former quarrel by ſtabbing him; which would have made it murder. On the contrary he had compoſed himſelf to work at his own door in a ſummer's evening; and when the deceaſed paſſed by neither provoked him by word or geſture. The deceaſed began firſt by ill language, and afterwards by collaring and dragging him from his ſeat, and rolling him in the road. The knife was uſed openly before the deceaſed came by, and not concealed from the byſtanders; though the deceaſed in his paſſion did not perceive it till they were both down. And though the priſoner was not juſtifiable in uſing ſuch a weapon on ſuch an occaſion, yet it being already in his hand, and the attack upon him very violent and ſudden, they thought it only amounted to manſlaughter; and he was recommended for a pardon.

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Michaelmas term 1776.

Serjt. Foſter's MS.

In this as in the caſe of malice prepenſe and expreſs, if the blow intended for one would in law only have amounted to manſlaughter, it will ſtill be the ſame, though by miſtake or accident it kill another.

§ 27. *Where blow intended for one falls on another.* Foſt. 262. 1 Hawk. ch. 31. ſ. 44. ante, ſ. 17. Brown's caſe, 1776, MS. Crown Caſ. Ref. Leach, 151. S. C. Poſt. ſ. 46. S. C.

A quarrel ariſing between ſome ſoldiers and a number of Keelmen at Sandgate, a violent affray enſued, and one of the ſoldiers was very much beaten. The priſoner, a ſoldier, who had before driven part of the mob down the ſtreet with his ſword in the ſcabbard, on his return, ſeeing his comrade thus uſed, drew his ſword, and bid the mob ſtand clear, ſaying he would ſweep the ſtreet; and on their preſſing on him he ſtruck at them with the flat ſide, and as they fled purſued them. The other ſoldier in the mean time had

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got away, and when the priſoner returned he aſked whether they had murdered his comrade; and being ſeveral times again aſſaulted by the mob, he brandiſhed his ſword, and bid them keep off. At this time the deceaſed, who from his dreſs might be miſtaken for a keelman, was going along about five yards from the priſoner; but before he paſſed the priſoner went up to him and ſtruck him on the head with the ſword, of which he preſently died. This was holden manſlaughter: it was not murder as the jury had found, becauſe there was a previous provocation, and the blood was heated in the conteſt: nor was it in ſelf-defence, becauſe there was no inevitable neceſſity to excuſe the killing in that manner.

Foſt. 278.

Poſt. f. 54. &c.

I ſhall have occaſion to conſider hereafter, in what caſes the party, retreating from a combat before a mortal ſtroke given, ſhall be ſaid to kill his aſſailant afterwards in ſelf-defence.

§ 28.

3. *As to caſes falling within the ſtatute of ſtabbing.*

The ſtatute of ſtabbing. 1 Jac. 1. c. 8.

Where death happens from heat of blood under particular circumſtances, the party killing may be indicted upon the ſtat. 1 Jac. 1. c. 8., commonly called the ſtatute of ſtabbing, which ouſts the offender of clergy in certain caſes therein ſpecified. This ſtatute was made, as Lord Bacon on another occaſion expreſſes himſelf, *upon the ſpur of the times*, on account of the quarrels between the Engliſh and Scotch upon the firſt union of the two crowns, and in order to obviate the inconvenience ariſing from the compaſſion of juries, who were apt to conſider that to be a provocation for extenuating murder which was not ſo in law; a proviſion altogether unneceſſary, as the common law had already fully provided for every caſe of aggravation againſt which this ſtatute was principally levelled. But whatever inconveniences might have happened from purſuing the literal conſtruction of the ſtatute, few, if any, can enſue from the interpretation which has been given of it. For it was agreed by the judges in Lord Morley's caſe, that this ſtatute was only *declaratory* of the common *law*: and Mr. Juſtice Foſter in commenting upon it has, in conformity with other opinions, declared that wherever the defendant is indicted at

Foſt. 298.

Ld Morley's caſe, Kel 55. 1 Hawk ch. 30. ſ. 5. Foſt. 298. 302. Morgan's caſe, 1 Bulſtr. 87. Rex v. Taylor, 5 Burr. 2796.

at common law and alſo upon the ſtatute, the queſtion moſt worthy of conſideration is, Whether the fact upon the evidence be *murder at common law* or not? In all caſes of doubt, therefore, the conſtruction upon the ſtatute ought to be in conformity with the benign principles of the common law. And all circumſtances which at common law will ſerve to juſtify, excuſe, or alleviate, in a charge of murder have always had their due weight in proſecutions grounded on the ſtatute.

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See the end of the next ſection.

1 Jac. 1. c. 8. continued by 3 Car. 1. c. 4. and 16 Car. 1. c. 4.

The words are, "Every perſon and perſons who ſhall "ſtab or thruſt any perſon or perſons that hath not then "any weapon drawn, or that hath not then firſt ſtricken "the party which ſhall ſo ſtab or thruſt, ſo as the perſon or "perſons ſo ſtabbed or thruſt ſhall thereof die within ſix "months then next following, although it cannot be proved "that the ſame was done of malice aforethought; yet the "party ſo offending, and being thereof convicted by verdict, "confeſſion, or otherwiſe, according to law, ſhall be ex-"cluded from the benefit of clergy, and ſuffer death as in "caſe of wilful murder." With a proviſo, "that the act ſhall not extend to caſes of ſelf-defence, misfortune, or in any other manner than as aforeſaid; nor to any perſon who ſhall commit manſlaughter in preſerving the peace, or chaſtiſing or correcting his child or ſervant."

§ 29. *The ſtatute extends not to aiders and abettors.* 1 Hale, 468. 2 Hale, 344. Foſt. 355. Alleyn, 44. 1 Hawk. ch. 30. ſ. 7.

1. The firſt queſtion to be conſidered is, Who ſhall be intended by "*every perſon and perſons* who ſhall ſtab," &c. The rigour of the ſtatute is confined to the very perſon ſtabbing or thruſting, and does not extend to others aiding and abetting him. And therefore where Welch and five others were indicted (16 Car.) on this ſtatute for the death of Swinnerton; becauſe it did not appear upon the evidence which of them made the thruſt, they being all preſent, they could only be convicted of manſlaughter at common law, and had their clergy. Neither are there any acceſſaries within this ſtatute.

When a ſtab or thruſt. 2 Hale, 469, 470. Foſt. 300.

2. As to what ſhall be intended to be *a ſtab or thruſt* within the meaning of the act; the thruſting with a ſtaff or any other blunt weapon ſeems within it. So ſhooting with fire arms, or ſending an arrow out of a bow, or a

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ſtone from a ſling; or uſing any deviſe of that kind *holden in the hand of the party at the inſtant of diſcharging it.* Though indeed Lord Hale puts a quære to the caſe of a piſtol or a *blow* with a ſword or ſtaff, becauſe Juſtice Jones denied it: and Hawkins ſays that killing a man with a hammer or the like cannot come properly under the notion of thruſting or ſtabbing. But certainly where the weapon is *delivered out of the hand* at the time the ſtroke is given, as in Williams's caſe, where a hammer was caſt; or as in Newman's caſe, where the point of a ſword was thrown at 20 yards diſtance; it has been thought with ſtrict propriety not to come under the terms "*thruſt*" or "*ſtab.*"

1 Hawk. ch. 30. ſ. 8.

Kel. 131. Williams's caſe, W. Jones, 432. Newman's caſe, O. B. Oct. 8. Ann. MS. Denton and Chapple. MS. Burnet, 58.

I would alſo add, that the ſtab or thruſt ought to be made with a weapon or inſtrument from whence danger was likely to enſue.

Any perſon armed in aid of the party killed at the time takes the caſe out of the ſtatute. Buckner's caſe, Sty. 467. Ante, ſ. 20.

3. "Any perſon or perſons that hath not then any weapon drawn," &c. has been properly holden to extend to any other perſon acting in concert upon the ſame deſign with the party killed. And therefore in Buckner's caſe, who was indicted on the ſtatute for killing Horwood, it appearing that Horwood and another man had come to Buckner's lodgings, and that the other man had ſtood with a ſword undrawn at the door to keep Buckner from going out till they might bring a bailiff to arreſt him for a debt due to Horwood; and that upon ſome altercation between Buckner and Horwood, the former had ſtabbed him with a dagger which he took out of his pocket; a majority of the court held it not within the ſtatute, the intent of which was to provide againſt *ſudden killing*, which that was not; there being a previous treſpaſs and impriſonment. And they held that if two aſſault a third perſon, and one of them ſtrike him, and he kill the other who did not ſtrike, he is not within the ſtatute, for it is the aſſault and ſtriking of both.

So if the party killed be armed at any time of the affray before the mortal ſtroke. Hunter's caſe, 3 Lev. 255.

4. It has been doubted upon the words "not having then a weapon drawn," whether "*then*" were to be confined to the inſtant *the ſtab was given*, or whether it related to the whole time of the combat? In Hunter's caſe the judge's were divided in opinion upon it. The circumſtances were theſe: upon mutual words of reproach between Hunter and De

Loy

Loy the former ſtruck the latter with his hand: thereupon De Loy attempted to draw his dagger at Hunter, but being prevented by the company preſent, he threw a pot at Hunter and miſſed him: on which Hunter gave De Loy the mortal wound with his ſword. Thoſe who were for the conviction admitted the pot to be a weapon drawn as long as it was in De Loy's hand; but thought that after he had thrown it out of his hand without hurt done, and was afterwards ſtabbed, the caſe fell within the ſtatute. On the other hand it was maintained that the word "*then*" referred *to the time of the fighting or controverſy* and not to the immediate inſtant of the wounding. And they thought it unreaſonable that one having a weapon drawn at one time during the controverſy, and having done all the miſchief he could with it, ſhould be within the protection of the ſtatute which was made to prevent the ſudden killing of men without provocation or defence. And they compared it to the caſe of two who are fighting, and one lets fall his ſword, or it is beat out of his hand, and he is then killed; which caſes they conceived could not be brought within the ſtatute. And it ſeems that the latter opinion being more conformable to the principles of the common law, in a caſe where the meaning of the ſtatute is at leaſt doubtful, is moſt to be relied on; more eſpecially as the priſoner in the above caſe finally had his clergy. Alſo, according to Hawkins, the diſcharging a piſtol, or throwing a pot or other dangerous weapon at the party, ſeems within the equity of the words "*having a weapon drawn.*" It appears upon the whole that if the party killed be at any one inſtant of time during the controverſy out of the protection of the ſtatute, between which time and the time of receiving the mortal wound the common law would allow for the priſoner's blood continuing to be heated, the caſe will not be governed by that ſtatute.

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1 Hawk. ch. 31. ſ. 8. *Vide* infra.

5. It remains further to be conſidered upon the laſt mentioned words of the ſtatute, what ſhall be ſaid to be "a *weapon drawn?*" as to which an ordinary cudgel or other thing proper for defence or annoyance in the hand of the party has been holden ſufficient to take the caſe out of the ſtatute.

What a weapon drawn. Foſt. 300. 1 Hale, 470. 3 Lev. 256. Sty. 468. Godb. 154. *Vide* ſupra.

This

Ch. V. § 24. *Statute of ſtabbing.*

This muſt equally govern the caſe of a ſword *in the ſcabbard*, and it extends alſo to a candleſtick or pot; but not to a ſmall riding *rod or cane ſuch as could not probably do harm*; and therefore what is ſaid by Glyn, C.J. in the caſe in Styles, that a tobacco pipe had been adjudged a weapon drawn, may perhaps admit of queſtion.

Sty. 468.
3 Lev. 256.

A blow given at any time before the mortal ſtroke takes the caſe out of the ſtatute.
Byard's caſe, W. Jones, 340.

6. But principally it is to be conſidered, whether by the words "nor having *firſt* ſtricken the party" killing, be meant not having given the firſt blow in the affray, or only, not having ſtruck before the mortal wound was given. Now though the former opinion prevailed in Byard's caſe, with the diſſent of only one judge who adhered to the latter conſtruction; yet that caſe has been conſiderably ſhaken ſince, when the view and ſpirit of this ſtatute has been more fully ſifted and underſtood. And indeed Lord Holt and Mr. Juſtice Foſter are ſtrongly of opinion, that in the above inſtance, not only the ſpirit but the obvious meaning of the words was perverted. And Mr. Juſtice Blackſtone ſays that if the deceaſed had ſtruck at all before the mortal wound given, though the ſtabber had given the firſt blow, it ſeems the better opinion that the caſe is not within the ſtatute: and Hawkins is expreſsly to that effect. It may alſo be worth conſidering, whether the above-mentioned words, "having firſt *ſtricken*," &c. mean any thing more than having firſt *aſſaulted*, &c., and therefore whether the attempt to ſtrike, being in law an aſſault and equivalent to an actual ſtriking, is not equally within the plain intent of the act as the ſtroke itſelf; in which caſe many of the difficulties which have occurred upon the conſtruction of the words, "not having "then any weapon drawn," might have met with an eaſier ſolution under this part of the act; though they ſeem to have been otherwiſe underſtood by Glyn, C. J.

Skin. 668.
Foſt. 301.
4 Blac. Com. 193, 4.
1 Hawk. ch. 30. ſ 6.
Sty. 468.

Exceptions.

Laſtly, The exceptions introduced into this ſtatute are to be adverted to: theſe are of ſelf-defence, miſ-chance, or for preſerving the peace, or chaſtiſing the party's child or ſervant. But other caſes coming within the letter of the act, and not covered by any of thoſe exceptions, have very rightly been adjudged not to be within the meaning of it. Such is the caſe of an adulterer ſtabbed by the huſband in the act of adultery; or where a man kills a thief who aſſaults his houſe:

Foſt. 298.
Ante, f. 20.
Sty. 469.

the

the one is manſlaughter, the other juſtifiable homicide. So where an officer puſhed abruptly and violently into a gentleman's chamber early in the morning, in order to arreſt him, not telling his buſineſs, or uſing words of arreſt; and the gentleman, not knowing that he was an officer, under the firſt ſurprize, took down a ſword that hung in the chamber and ſtabbed him; this was ruled manſlaughter at common law, though the defendant was indicted on this ſtatute: for from the officer's behaviour the defendant might reaſonably have apprehended that he came to rob or murder him. Perhaps there were circumſtances in that caſe not mentioned, which might reaſonably induce ſuch a ſuſpicion, and raiſe ſuch a fear as might fall in conſtantem virum. Upon an outcry of thieves in the night, a perſon, who was concealed in a cloſet to eſcape the obſervation of the family, but no thief, was in the hurry and ſurprize ſtabbed in the dark: this was conſidered as an innocent miſtake, and ruled to be homicide by miſadventure. It will ſuffice after theſe examples to conclude theſe obſervations on the ſtatute with the opinion delivered by Glyn C. J. in Buckner's caſe, that in order to bring a caſe within the meaning of the act *there ought to be malice.*

Ch. V. § 29. *Statute of ſtabbing.*

Exceptions. 1 Hale, 470.

Poſt. f. 46.

1 Hale, 42. 474. *Vide* this caſe more at large, poſt. f. 46.

Sty. 467. Ante, f. 28. *Vide* poſt. f. 118. for the form of indictment on this ſtatute.

4. *How long the law will allow for the blood continuing heated under the circumſtances; and what ſhall be conſidered as evidence of its having cooled.*

§ 30. *Duration of paſſion.* Ante, f. 19.

In every caſe of homicide, how great ſoever the provocation may have been, if there be a ſufficient time for the paſſion to ſubſide and for reaſon to interpoſe, ſuch homicide will be murder. Therefore in the caſe of an adulterer before mentioned, if the huſband kill him deliberately and upon revenge after the fact and ſufficient cooling time, the provocation will not avail in alleviation of the guilt. Poiſoning, being an act of deliberation, always ſhews malice.

Poſt. 296.

Ante, f. 20.

Ante, f. 12. 1 Hale, 455.

With reſpect to what interval of time ſhall be allowed for paſſion to ſubſide, it is much eaſier to lay down rules for determining what caſes are without the limits, than how far exactly thoſe limits extend. It muſt be remembered, that in theſe caſes the immediate object of inquiry is, whether the ſuſpenſion of reaſon ariſing from ſudden paſſion continued

General rules of evidence. Interval of time. Poſt.

Ch V. § 30. *Duration of Paſſion.*

nued from the time of the provocation received to the very inſtant of the mortal ſtroke given: for if from any circumſtances whatever it appear that the party reflected, deliberated, or cooled, any time before the fatal ſtroke given; or if in legal preſumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty. And it has been ſhewn that ſuch malice will be preſumed, even though the act be perpetrated recently after the provocation received, if the inſtrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature: becauſe the law ſuppoſes that a party capable of acting in ſo outrageous a manner, upon a ſlight provocation, muſt have entertained at leaſt a general if not a particular malice, and have before determined to inflict ſuch vengeance upon any pretence that offered.

2 Ld. Ray. 1496.

Ante, f. 21, 22, 23.

Inſtrument or manner of death.

I will conſider ſhortly ſome other general circumſtances which amount to evidence of malice, in diſproof of the party's having acted under the influence of paſſion only. Thus, if between the provocation received and the ſtroke given he fall into other diſcourſe, or diverſions, and continue ſo engaged a reaſonable time for cooling; or if he take up and purſue any other buſineſs or deſign, not connected with the immediate object of his paſſion, nor ſubſervient thereto, ſo that it may be reaſonably ſuppoſed that his intention was once called off from the ſubject of the provocation. Again, if it appear that he meditated upon his revenge, or uſed any trick or circumvention to effect it; for that ſhews *deliberation*, which is inconſiſtent with the excuſe of *ſudden paſſion*, and is the ſtrongeſt evidence of malice. It may be further obſerved in reſpect to time, that in proportion to the lapſe thereof between the provocation and the ſtroke, leſs allowance ought to be made for any exceſs of retaliation, either in the inſtrument, or the manner of it. In Rowley's caſe before mentioned, if, after running three quarters of a mile, he had killed the boy who beat his ſon with an hedge-ſtake or other dangerous weapon, it would undoubtedly, according to Mr. Juſtice Foſter, have been murder. The mere length of time intervening between the injury and the retaliation aids very much the preſumption of malice in law; for that is in ſome caſes

Oneby's caſe, poſt. Kel. 56.

Ante, 251.

Ante, f. 22.

Foſt. 294.

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caſes evidence in itſelf of deliberation. Therefore, though if upon a ſudden quarrel the parties agree to fight upon the ſpot; or if not having their weapons there, they preſently, without any other matter intervening, fetch them and go into the field and fight; and one fall, it will be but manſlaughter: yet if they appoint to fight the next day, or even upon the ſame day at ſuch an interval of time as that the paſſion might have ſubſided; or if, before any blows paſſed or words of anger, they agree to fight at a more convenient place, or the fight otherwiſe appear to be upon deliberation, and death enſue; it will be murder.

Foſt. 297. 1 Hale, 453. Kel. 27. 1 Hawk. ch. 31. ſ. 22. 29. MS. Tracy, 56. 4 Blac. Com. 191. 3 Inſt. 51. 1 Bulſt. 86. Ld. Morley's caſe, 7 St. Tr. 421. Kel. 56. Cromp. 23. 1 Sid. 277. Major Oneby's caſe, O. B. 12 Geo. 1. 2 Stra. 766. and 2 Ld. Ray. 1485.

Major Oneby was indicted for the murder of Mr. Gower; and a ſpecial verdict was found, ſtating, that the priſoner being in company with the deceaſed and three other perſons at a tavern in a friendly manner, after ſome time began playing at Hazard; when Rich, one of the company, aſked if any one would ſet him three half crowns; whereupon the deceaſed in a jocular manner laid down three halfpence, telling Rich he had ſet him three pieces; and the priſoner at the ſame time ſet Rich three half crowns, and loſt them to him. Immediately after which the priſoner in an angry manner turned about to the deceaſed, and ſaid, *it was an impertinent thing to ſet halfpence, and that he was an impertinent puppy for ſo doing*; to which the deceaſed anſwered, *whoever called him ſo was a raſcal.* Thereupon the priſoner took up a bottle, and with great force threw it at the deceaſed's head, but did not hit him, the bottle only bruſhing ſome of the powder out of his hair. The deceaſed in return immediately toſſed a candleſtick or bottle at the priſoner, which miſſed him; upon which they both roſe up to fetch their ſwords which then hung up in the room, and the deceaſed drew his ſword; but the priſoner was prevented from drawing his by the company: the deceaſed thereupon threw away his ſword; and the company interpoſing, they ſat down again for the ſpace of an hour. At the expiration of that time the deceaſed ſaid to the priſoner, *we have had hot words, but you were the aggreſſor; but I think we may paſs it over*; and at the ſame time offered his hand to the priſoner, who made anſwer, *No, damn you, I will have your blood.* After which the reckoning being paid, all the company except the priſoner

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priſoner went out of the room to go home; and he called to the deceaſed, ſaying, *Young man come back, I have ſomething to ſay to you:* whereupon the deceaſed returned into the room, and immediately the door was cloſed, and the reſt of the company excluded; but they heard a claſhing of ſwords, and the priſoner gave the deceaſed the mortal wound. It was alſo found, that at the breaking up of the company the priſoner had his great coat thrown over his ſhoulders, and that he received three ſlight wounds in the fight; and that the deceaſed being aſked upon his death-bed whether he received his wound in a manner among ſwordmen called fair, anſwered, *I think I did.* It was further found that from the throwing of the bottle *there was no reconciliation between the priſoner and the deceaſed.* Upon theſe facts all the Judges were of opinion that the priſoner was guilty of murder; he having acted upon malice and deliberation, and not from ſudden paſſion. It muſt, I think, be taken upon the facts found in the verdict, and the argument of the Chief Juſtice, that after the door had been ſhut the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and ſo declared to be, was the evidence of *expreſs malice*, after the interpoſition of the company, and the parties had all ſat down again for an hour. Under thoſe circumſtances the Court were of opinion that the priſoner had had *reaſonable time for cooling*: after which, upon an offer of reconciliation from the deceaſed, he had made uſe of that bitter and deliberate expreſſion, that *he would have his blood.* And again, the priſoner remaining in the room after the reſt of the company retired, and calling back the deceaſed by the contemptuous appellation of *young man*, on pretence of having ſomething to ſay to him, altogether ſhewed ſuch ſtrong proof of deliberation and coolneſs as precluded the preſumption of paſſion having continued down to the time of the mortal ſtroke. Though even that would not have availed the priſoner under theſe circumſtances; for it muſt have been implied, according to Mawgridge's caſe, that he acted upon malice; having in the firſt inſtance, before any provocation received, and without warning

Ante, p. 243. Poſt. f. 47.

ing or giving time for preparation on the part of Mr. Gower, made a deadly aſſault upon him.

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In like manner any circumſtance which ſhews deliberation or reflection rebuts the preſumption of paſſion. As in Bromwick's caſe, who was indicted for aiding and abetting Lord Morley in the murder of Haſtings: it appearing that when the quarrel happened at a tavern, Lord Morley objected to fighting at that time on account of the diſadvantage he ſhould have by reaſon of the height of his ſhoes; and preſently afterwards they went into the field and fought: this was relied on, as ſhewing that he did not fight in the firſt paſſion.

1 Hawk. ch. 31. ſ. 23. Bromwick's caſe, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 421.

Vide 2 Ld. Ray. 1496.

III. *Homicide in the Proſecution of ſome Act or Purpoſe criminal or unlawful in itſelf; wherein Death enſues collaterally to or beſide the principal Intent.*

§ 31.

I ſay, *collaterally to or beſide the principal intent*, in order to diſtinguiſh this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpoſe of the mind was deſtruction to another.

Death enſuing collaterally from an act malum in ſe.

And firſt it is principally to be obſerved, that if the act on which death enſue be malum in ſe, it will be murder or manſlaughter according to the circumſtances: if done in proſecution of a felonious intent, however the death enſued againſt or beſide the intent of the party, it will be murder: but if the intent went no further than to commit a bare treſpaſs, it will be manſlaughter. As where A. ſhoots at the poultry of B., and by accident kills a man: if his intent were to ſteal the poultry, which muſt be collected from circumſtances, it will be murder, by reaſon of that felonious intent: but if it were done wantonly and without that intent, it will be barely manſlaughter. A. whips an horſe on which B. is riding; whereupon the horſe ſprings out and runs over a child and kills it: this is manſlaughter in A., but miſadventure in B.

Foſt. 258, 9. Plummer's caſe, 1 Hale, 475. 3 Inſt. 56. Kel. 119. Sum. 56. 6 St. Tr. 222. 1 Hawk. ch. 29. ſ. 11. ch. 31. ſ. 41.

1 Hawk. ch. 29. ſ. 3. 1 Hale, 476.

By

(In the Proſecution of ſome other unlawful Act).

Ch. V. § 31. *From an act malum in ſe.*

By the ſtatute 21 Ed. 1. de malefactoribus in parcis, "if a foreſter, parker, or warrener, find any treſpaſſers wandering within his liberty, intending to do damage therein, who will not yield after hue and cry made to ſtand unto the peace, but do continue their malice, and diſobeying the king's peace, do flee or defend themſelves with force and arms; if ſuch parker, &c. or their aſſiſtants, kill ſuch offenders in arreſting or taking them, they ſhall not be troubled for the ſame, nor ſuffer any puniſhment." But they cannot kill perſons who come to take only decayed wood. And if ſuch offenders as are mentioned in the ſtatute kill the keeper, &c. it will be murder in all; although it appear that the keeper ordering them to ſtand aſſaulted them firſt, and that they fled and did not turn till one of the keeper's men had fired and hurt one of their companions. By ſtat. 3 & 4 W. & M. c. 10. ſ. 5. W. & M. owners of deer in any incloſed land, or any perſons under them, may reſiſt offenders in like manner as in ancient parks. And by ſtat. 4 & 5 W. & M. lords of manors, or any others authorized by them as game keepers, may reſiſt offenders in the night within their reſpective manors or royalties, in the ſame manner and with equal indemnity as if the fact had been committed in any ancient chaſe, &c.

21 Ed. 1. ſt. 2. 1 Hale, 491. *Vide* poſt. ſ. 70. 46.

1 MS. Sum. 145. 175. Sum 37. 46. Palm. 546. 2 Roll. Rep. 120.

3 & 4 W. & M. c. 10. ſ. 5.

4 & 5 W. & M. c. 23. ſ. 4.

R. v. Anneſley and Redding, 9 St. Tr. 329, 330.

Upon the trial of Mr. Anneſley and Redding in 1742 ſome doubt was intimated, whether an aſſiſtant to a legal game keeper could juſtify ſeizing a fiſhing net under the ſtat. 4 & 5 W. & M. c. 23. ſ. 5., and whether the authority were not perſonal. But without conſidering that queſtion, it is ſufficient to obſerve that that caſe did not turn upon the clauſe in the act above recited, which has expreſs reference to the powers given by the ſtat. 21 Ed. 1.; and that ſtatute extends in terms to aſſiſtants.

§ 32. *With intent of bodily harm.*

He who voluntarily, knowingly, and unlawfully intends hurt to the perſon of another, though he intend not death, yet if death enſue, is guilty of murder or manſlaughter according to the circumſtances. As, if A. intending to beat B. happen to kill him, if done from preconceived malice, or in cool blood upon revenge, it will be no alle-

1 Hale, 39. 472. 1 MS. Sum. Foſt. 259. MS. Burnet, 47. 49. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 38.

viation

viation that he did not intend all the miſchief that followed: if without ſuch motives, but upon an unlawful occaſion, as in public prize fighting, it will be manſlaughter. So, if a large ſtone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him or any other; this is murder. But the nature of the inſtrument, and the manner of uſing it, as calculated to produce great bodily harm or not, will vary the offence in all ſuch caſes. And the like rule holds where the inſtrument is levelled indiſcriminately at any perſon on whom it may happen to light.

Ch. V. § 32. *With intent of bodily harm.*

Poſt. f. 42.

Kel. 127.

So if one be doing an unlawful act, though not intending bodily harm to any perſon; as throwing a ſtone at another's horſe; if it hit a perſon and kill him, it is manſlaughter. Yet in ſuch caſes it ſeems that the guilt would rather depend on one or other of theſe circumſtances, either that the act might probably breed danger, or that it was done with a miſchievous intent.

Without intent of bodily harm. 1 Hale, 39. 475.

§ 33.

The above rule governs all caſes where divers perſons reſolve generally to reſiſt all oppoſers in the commiſſion of any breach of the peace, and to execute it with violence, or in ſuch a manner as naturally tends to raiſe tumults and affrays; as by committing a violent diſſeiſin with great numbers, or going to beat a man, or rob a park, or ſtanding in oppoſition to the ſheriff's poſſe. For they muſt at their peril abide the event of their actions who wilfully engage in ſuch bold diſturbances of the public peace. In ſuch caſes the law adopts the preſumption of fact that they came with intent to oppoſe all who ſhould hinder them in their deſign.

Confederacy to do unlawful acts. 1 Hale, 53. 442. 445. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 46. 4 Blac. Com. 200. 2 Roll. Rep 120. MS. Burnet, 47. & *vide* tit. Principal and Acceſſary.

And in all ſuch inſtances, whether the breach of the peace were ſudden or premeditated, not only officers but even private perſons may interfere to ſuppreſs the riot, giving notice of ſuch their intention; and much more may they defend themſelves: and if in ſo doing they kill any of the rioters, if they could not otherwiſe accompliſh their purpoſe, it will be juſtifiable. And the killing of any perſon ſo interfering by any of the rioters would be murder in all who took part in the fact or abetted thereto.

1 Hawk ch. 28. ſ. 14. ch. 31. ſ. 48. *vide* the Riot Act, 1 Geo. 1. c. 5. tit. Riots, &c.

Vide poſt. Homicide in advancement of Juſtice.

Ch. V. § 33. *By confederacy.*

Homicide in proſecution of ſmuggling. Plummer's caſe, Kel. 109. 12 Mod. 627. 1 Hale, 443. See tit. Principal and Acceſſary.

Several perſons were engaged in a ſmuggling tranſaction; and upon an attempt to oppoſe their deſign by the king's officers, one of the ſmugglers fired a gun, and killed one of his accomplices. It was agreed by the Court, that if the gun were diſcharged at the king's officers in proſecution of the original deſign, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation againſt the accomplice from anger or ſome precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular caſe by the general purpoſe in view at the time the death happened, the killing muſt be in purſuance of ſuch unlawful purpoſe and not collateral to it.

1 Hale, 443. Kel. 112, 113, 114.

Homicide in reſiſting a diſtreſs. Rex v. Hubſon and others, O. B. 1690, MS. Chapple J. 1 MS. Sum 186. *Vide* Leach, 6. S. C. *Vide* tit Principal and Acceſſary.

So where the priſoners were hired by a tenant to carry away his goods to prevent a diſtreſs, and went armed with bludgeons and other offenſive weapons; and the landlord aſſiſted by others attempted to prevent it; and in the violence of the affray, after the conſtable had in vain attempted to diſperſe them, a boy ſtanding at his father's door, who took no part therein, was killed by one of the company unknown; Holt C. J. and Pollexfen C. J. held it murder in all the party, by reaſon that the priſoners came armed with offenſive weapons, and in a riotous way, and that they perſiſted in the affray after the conſtable had interfered to put a ſtop to it. But the majority of the judges held, that as the boy was unconcerned in the affray, the killing of him could not be imputed to the reſt, who were merely engaged in the general affray. That he could not be deemed an oppoſer of the party, ſo as to make him an object of this contention; and that they could no more be ſaid to have abetted the killing of him than if one of the company had killed a perſon looking out of a window.

Vide 8 Mod. 164. & 12 Mod. 629.

The reaſoning of the majority in the above caſe ſeems to have proceeded upon the defect of any evidence to ſhew, that the ſtroke by which the boy was killed was either levelled at any of the oppoſing party but had hit him by miſtake, or was levelled at him upon the ſuppoſition that he was one of the opponents; for otherwiſe it ſeems that in either of thoſe caſes the ſame guilt would have attached upon

upon all who were concerned in the ſame deſign with the ſtriker as upon the ſtriker himſelf. For if the act or deſign be unlawful and premeditated, and death happen from any thing done in the proſecution of it, it is clearly murder in all who take part in the ſame tranſaction. In the above caſe the two Chief Juſtices were of opinion, in which the others did not differ from them, that though the moving of the goods might be lawful, yet the continuing of the party together after the conſtable had ordered them to diſperſe was unlawful: and beſides, that the great numbers who were thus aſſembled, and the unuſual weapons they were armed with, did alſo make the aſſembly unlawful. Perhaps the more correct method would have been for the jury to have found the fact one way or other, whether the ſtroke which killed the boy were or were not aimed at any of the aſſailants, or levelled at him miſtaking him to be ſuch.

Ch. V. § 33. *By conſpiracy.*

1 MS. Sum 187.

§ 34. *To affect all the confederates the killing by one muſt be during the actual ſtrife or abetment of all.*

But in order to make the killing, by any, murder in all of thoſe who are confederated together for an unlawful purpoſe, merely on account of the unlawful act done or in contemplation, it muſt happen during the actual ſtrife or endeavour, or at leaſt within ſuch a reaſonable time afterwards as may leave it probable that no freſh provocation intervened.

Caſe of Drayton Baſſet, 1 Hale, 440. 444, 5. Crompt. 28. Sum. 56. 1 Hawk. ch. 31. ſ. 47. Poſt. ſ. 48. S. C.

A. with 30 others entered with force into B.'s houſe and ejected him and his family. On the night of the third day after, B. and 20 others came with weapons with an intent to re-enter, and one of them caſt fire into a thatched houſe adjoining to the manſion; whereupon one of A.'s party fired a gun and killed one of B.'s party, the reſt of whom retired, and A.'s party continued in poſſeſſion ſeveral days after. This was ruled manſlaughter in A. and his company, becauſe their entry and force was illegal; but not murder, becauſe there was a ſudden provocation. It appears from one paſſage in Hale that A.'s entry was upon a claim of title, and not as an avowed wrong doer: for otherwiſe it can hardly be conceived how his tortious defence of that, which he had violently uſurped ſo recently before from the acknowledged owner, could in any ſort extenuate the homicide committed in conſequence of it. B. had an undoubted right to reſiſt at all hazards the attempt of A. to turn him

1 Hale, 444.

Ch. V. § 34. *By confederacy.*

out of his manſion; and while the uſurpation was yet recent had a right to endeavour to reinſtate himſelf in the poſſeſſion which he had juſt loſt. It ſeems to have been ſo much a continuation of the ſame tranſaction, that if B. had regained his poſſeſſion he could not have been indicted for a forcible entry; and though poſſibly it might be doubtful whether he would have been juſtified in killing any of A.'s party in the attempt after having once loſt the poſſeſſion for near three days; yet undoubtedly ſo recent and grievous a provocation would have reduced the offence to manſlaughter at leaſt. But if A. were a mere wrong doer, there does not ſeem to be a like adequate provocation to extenuate the fact committed by him in defence of his own avowed tortious act. So recent an uſurpation, and never acquieſced in, could not give him even a colour of title to the poſſeſſion againſt the owner.

This part of the ſubject however, as it affects one perſon for the act of another, is ſo intimately blended with the doctrine of Principal and Acceſſary, that to avoid repetition I refer the further conſideration of it to that title.

§ 35. *Death on act malum prohibitum.* Poſt. 259. 1 Hale, 475. Poſt. f. 41.

The other general rule is, that if an act not unlawful itſelf, as ſhooting at game, be prohibited to be done unleſs by perſons of a certain deſcription, the caſe of a perſon not coming under that deſcription offending againſt ſuch ſtatute, and in ſo doing unfortunately killing another, will fall under the ſame rule as that of a qualified man, and muſt equally be attributed to miſadventure.

IV. *Homicide from Impropriety, Negligence, or Accident, in the Proſecution of an Act lawful in itſelf, or intended by way of Sport or Recreation.*

§ 36. *General principle.* Foſt. 258. 1 Hale, 39. 44. 472. MS. Burnet, 43.

1. The boundaries between impropriety, negligence, and mere accident, are often ſcarcely perceptible; but as the difference between them leads to different concluſions as to the degree of offence, I ſhall chiefly confine myſelf under this head to point out the diſtinction; premiſing as a leading principle, that where a man, *doing a lawful act without intention*

tion of bodily harm to any perſon, and uſing proper caution to prevent danger, unfortunately happens to kill another, ſuch act amounts only to homicide by miſadventure. The act muſt be lawful; for if it be unlawful, the caſe will be either murder or manſlaughter, as was ſhewn under the laſt head. It muſt not be done with intention of great bodily harm; for then the legality of the act, conſidered abſtractedly, would be no more than a mere cloak or pretence, and conſequently would avail nothing. The act muſt alſo be done in a proper manner, and with due caution to prevent danger.

Ch. V. § 36. *General Principle.*

Ante, f. 31, 32.

Infra.

§ 37. *Correction in foro domeſtico.*

Thus parents, maſters, and other perſons having authority in foro domeſtico, may give reaſonable correction to thoſe under their care; and if death enſue from ſuch correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the meaſure of it, or in the inſtrument made uſe of for that purpoſe, it will be either murder or manſlaughter according to the circumſtances. If done with a cudgel, or other thing not likely to kill, though improper for the purpoſe of correction, it will be manſlaughter: if with a dangerous weapon likely to kill or maim, as a peſtle or great ſtaff, it will be murder: due regard being had in both inſtances to the age and ſtrength of the party. Grey, a blackſmith, ſtruck his ſervant with a bar of iron by way of correction for improper behaviour, by which he was killed; held murder. A woman kicked and ſtamped on the belly of her child; and ruled the ſame.

Foſt. 262. Kel. 28. 133. 1 Hale, 454. 457. 473. 4. 1 Hawk. ch. 29. ſ. 5.

Grey's caſe, Kel. 64, 5.

Yet though the correction exceed the bounds of moderation, the Court will pay a tender regard to the nature of the provocation, where the act is manifeſtly accompanied with a good intent, and the inſtrument not ſuch as muſt in all probability occaſion death; though the party were hurried to great exceſs. As was the caſe of a father, whoſe ſon had frequently been guilty of ſtealing, complaints of which had come to the father, who had often corrected him. At length the ſon being charged with another theft, and reſolutely denying it, though proved againſt him, the father in a paſſion beat his ſon with a rope by way of chaſtiſement for

Worceſter Sp. Aſſ. 1775, Serjt Forſter's MS.

Ch. V. § 37. *Correction in foro domeſtico.*

the offence ſo much, that he died. The father expreſſed the utmoſt horror, and was in the greateſt affliction for what he had done, intending only to have puniſhed him with ſuch ſeverity as to have cured him of his wickedneſs. The learned Judge who tried the father conſulted his colleague in office and the principal counſel on the circuit, who all concurred in opinion that it was only manſlaughter: and ſo it was ruled.

§ 38. *Accidents in common occupations.*

Accidents frequently occur amongſt perſons following their lawful occupations, eſpecially ſuch from whence danger may probably ariſe. If they ſaw the danger, and yet perſiſted without ſufficient warning, it will be murder. If the act were ſuch as was likely to breed danger, and they neglected the ordinary cautions, it will be manſlaughter at leaſt, on account of ſuch negligence; making due allowance for the nature of the occupation, and the probability of the danger; which if very remote, and in the particular inſtance not reaſonably to be expected, may reduce the act to miſadventure. The criterion in ſuch caſes is to examine whether common ſocial duty would, under the circumſtances, have ſuggeſted a more circumſpect conduct.

Workmen throwing rubbiſh. Foſt. 262, 3. 1 Hale, 472, 5. 2 Hawk. ch. 29. ſ. 4. 4 Blac. Com. 192. Pult. de pace, 123.

For inſtance, in the caſe of workmen throwing ſtones and rubbiſh from an houſe in the ordinary courſe of their buſineſs, by which a perſon underneath happens to be killed: if they deliberately ſaw the danger, or betrayed any conſciouſneſs of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the groſs impropriety of the act. If they did not look out, or not till it was too late, and there was even a ſmall probability of perſons paſſing by, it will be manſlaughter. But if it had been in a retired place where there was no probability of perſons paſſing by, and none had been ſeen about the ſpot before, it ſeems to be no more than accidental death. For though the act itſelf might breed danger, yet the degree of caution requiſite being only in proportion to the apparent neceſſity of it, and there being no apparent call for it in the inſtance put, the rule applies, de non exiſtentibus et not apparentibus eadem eſt ratio. So if

Hull's caſe, O. B. 1664, Kel. 40.

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any perſon had been before ſeen on the ſpot, but due warning were given, it will be only miſadventure. On the other hand, in London and other populous towns, at a time of day when the ſtreets are uſually thronged, it would be manſlaughter, notwithſtanding the ordinary caution uſed on other occaſions of giving warning; for in the hurry and noiſe of a crouded ſtreet few people hear the warning or ſufficiently attend to it, however loud.

Ch. V. § 38. *Accidents in common occupations.*

Foſt. 263. Kel. 40. 1 Hawk. ch. 29. ſ 4. 4 Blac. Com. 192. 1 MS. Sum. 134.

Again, a perſon driving a carriage happens to kill another: if he ſaw or had timely notice of the miſchief likely to enſue, and yet wilfully drove on, it will be murder; for the preſumption of malice ariſes from the doing of a dangerous act intentionally: there is the heart regardleſs of ſocial duty. If he might have ſeen the danger, but did not look before him, it will be manſlaughter, for want of due circumſpection. But if the accident happened in ſuch a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excuſed.

In driving carriages 1 H. c, 476. Foſt. 263. ante.

A. was driving a cart with four horſes in the highway at Whitechapel; and he being in the cart, and the horſes upon a trot, they threw down a woman who was going the ſame way with a burthen upon her head, and killed her. Holt C. J., Tracy J., Baron Bury, and the Recorder Lovel, held this to be only miſadventure. But, by Lord Holt, if it had been in a ſtreet where people uſually paſs, this had been manſlaughter; but it was clearly agreed that it could not be murder.

O. B. Seſſ. before Mich. T. 1704, MS. Tracy, 32.

It muſt be taken for granted from this note of the caſe, that the accident happened in an highway *where people did not uſually paſs*; for otherwiſe the circumſtance of the driver's being in his cart, and going ſo much faſter than is uſual for carriages of that conſtruction, ſavoured much of negligence and impropriety: for it was extremely difficult, if not impoſſible, to ſtop the courſe of the horſes ſuddenly in order to avoid any perſon who could not get out of the way in time. And indeed ſuch conduct in a driver of ſuch heavy carriages might under moſt circumſtances be thought to betoken a want of due care, if any though but few perſons might probably paſs by the ſame road. The greateſt poſſible care is

Foſt. ſ. 40.

Ch. V. § 38. *Accidents in common occupations.*

not to be expected, nor is it required; but whoever seeks to excuse himself, for having unfortunately occasioned by any act of his own the death of another, ought at least to shew that he took that care to avoid it which persons in similar situations are most accustomed to do. Upon this supposition the death is to be referred to misadventure, which was occasioned by the head of a workman's axe flying off and killing a bystander.

1 Hale, 39. 1 Hawk. ch. 29. s. 2.

Overloading boats, &c. 10 Geo. 2. c. 32. s. 8.

Our statute law has severely animadverted on one species of criminal impropriety, whereby death is often occasioned: for by stat. 10 Geo. 2. c. 32. s. 8. if any person navigating for hire or gain on the Thames between Gravesend and Windsor receive into his tilt-boat, row-barge, ferry-boat, or other boat or wherry, a greater number of persons than the act allows, and any passenger shall then be drowned; such person being thereof lawfully convicted is guilty of felony, and shall be transported as a felon.

Stage coaches. 28 Geo. 3. c. 57.

This may serve as a caution to stage coachmen and others who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers; the number of whom are now regulated by act of parliament. It is an improvident act, against which they have been warned by the voice of the legislature, as well as by general and repeated experience of the bad consequences.

Administering medicine.

One other usual act of improvidence mentioned in the books may not be improperly adverted to. If one who is no regular physician or surgeon administer medicine, or perform an operation, which contrary to expectation kills the patient, it was formerly holden manslaughter. But Lord Hale denies this very properly: it is rather misadventure. Though this doubt should make ignorant people cautious how they tamper in these matters. But if one give physic to another in sport, of which he dies, it will be manslaughter: and if given to procure an abortion, and the woman herself die, it is murder.

Brit. c. 5. 4 Inst. 251. 1 Hale, 429. 1 Hawk. ch. 31. s. 62.

1 Hale, 431. Ante, s. 17.

§ 39. *From wilful neglect to provide against probable mischief.*

He who wilfully neglects to prevent a mischief, which he may and ought to provide against, is answerable for the consequence: as where a man, having an ox which he knows to

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be miſchievous by being uſed to gore, does not put him in ſome place of ſecurity, but lets him range where perſons are likely to paſs, and he afterwards kills a man: according to ſome opinions, amongſt which is Lord Hale's, the owner may be indicted for manſlaughter (*a*). By Mr. Juſtice Burnet, it would not be more than manſlaughter, and might be leſs. However, as it is agreed by all, ſuch a perſon is at leaſt guilty of a very great miſdemeanour. And if the owner purpoſely let looſe a dangerous or vicious animal, though it be only to frighten people, and it kill a man, the caſe may even amount to murder: ſtill more if it were done maliciouſly.

Ch. V. § 39. *From wilful neglect to provide againſt probable miſchief.*

1 Hale, 431. Pult. de pace. 126. 4 Blac. Com. 197. 1 Hawk. ch. 31. ſ. 8. MS. Burnet, 53.

§ 40. *Want of due caution in uſing dangerous inſtruments, &c.*

Death alſo happens from ſome unexpected occurrence in the courſe of human affairs. And herein the degree of impropriety or negligence attending the act is to be noted, in order to diſtinguiſh it from mere accidental death. The caſes which occur on this head turn on the queſtion, whether due caution have been uſed or not. And in general it may be obſerved, that the degree of caution requiſite to bring the caſe within the limits of miſadventure muſt be proportioned to the probability of danger attending the act *immediately conducive* to the death. I ſay, *immediately* conducive; becauſe inferences of guilt are not to be drawn from remote cauſes, all malice apart; but muſt be referred to ſuch only as are actually moving to the death. And therefore where a man leaves a loaded gun in his houſe, and it is afterwards diſcharged by another who knew not it was loaded, whereby death enſues; the firſt is in no reſpect ameſnable to the laws for the conſequences; though perhaps it would have been more prudent to have placed the gun out of the reach of ſuch an accident, or to have unloaded it when it was laid by.

(*a*) The Moſaical law carried this matter ſtill further, Exod. xxi. 29. "But if "the ox were wont to puſh with his horn in time paſt, and it hath been teſtified "to his owner, and he hath not kept him in, but that he hath killed a man or "a woman, the ox ſhall be ſtoned, and his owner alſo ſhall be put to death." It appears however from the next verſe that in ſuch a caſe his life might be ranſomed by payment of the ſum which was laid upon him.

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(*From Impropriety, Negligence, or Accident in lawful Acts, or at Sports*).

Ch. V. § 40. *Accidents in unexpected occurrences.*

One lays poiſon to kill rats, and another takes it and dies; this is miſadventure. But it muſt be underſtood to have been laid in ſuch manner and place as not to be eaſily miſtaken for proper food; for that would betoken great inadvertence, and might in ſome caſes amount to manſlaughter.

1 Hale, 431. Sum. 50.

Burton's caſe, 1 Stra 481.

A gentleman came to town in a chaiſe, and before he got out of it fired his piſtols in the ſtreet, which by accident killed a woman. This was ruled manſlaughter: the act was likely to breed danger, and manifeſtly improper.

Deer having broken into the corn of A. and ſpoiled it, he went with his ſervant to watch at night with a gun, and charged him to fire when he heard any thing ruſh into the ſtanding corn: and upon A.'s ruſhing into the corn in another part of the field, the ſervant fired and killed him. In the firſt paſſage, wherein Lord Hale mentions this caſe, he ſeems to think that it amounted to manſlaughter, for want of due diligence and care in the ſervant in ſhooting upon ſuch a token as might befall a man as well as a deer: however he ſays, it was a queſtion of great difficulty. But in a ſubſequent part of his work, the learned author relating the ſame caſe, which had been determined by himſelf at Peterborough, ſays, that he had ruled it to be only miſadventure; for the ſervant was miſguided by his maſter's own direction, and was ignorant that it was any thing elſe but the deer. But it ſeemed to him, that if the maſter had not given ſuch direction which was the occaſion of the miſtake, it would have been manſlaughter; becauſe of the want of due caution in the ſervant to ſhoot before he diſcovered his mark. Yet ſtrictly conſidered; if from all the other circumſtances of the caſe there appeared a want of due caution in the ſervant, I do not ſee how the command of the maſter could ſupply it; much leſs how it could excuſe him in doing an unlawful act. The excuſe of having uſed ordinary caution can only be admitted where death happens accidentally in the proſecution of ſome lawful act.

1 Hale, 470.

1 Hale, 40.

Poſt. f. 46.

Foſt. 264. 1 MS. Sum. 134. Ante, p. 263, 4.

But in none of theſe inſtances, even where the act of the party is immediately conducive to the death, does the law require the utmoſt caution that can be uſed: it is ſufficient

Ch. V. § 50. *Accidents in unexpected occurrences.*

that a reaſonable precaution, what is uſual and ordinary in the like caſes, be taken; ſuch as hath been found by long experience in the courſe of human affairs to anſwer the end: for ſuch conduct ſhews that the party was regardful of ſocial duty, and free from any manner of guilt. And therefore upon that principle Mr. Juſtice Foſter denies Rampton's caſe to be law: and indeed there is a quære put to it in the margin of the reporter. The priſoner had found a piſtol in the ſtreet, which he had reaſon to believe was not loaded, having tried it with the rammer, which had gone down into the muſſel of the piſtol; the rammer in fact being too ſhort. He carried the piſtol home, and his wife ſtanding before him, he cocked it and touched the trigger; on which the piſtol went off and killed the woman. This was ruled manſlaughter. In truth, the man had uſed the ordinary precaution adapted to the probability of danger in ſuch caſes: he had examined the piſtol by the uſual method of trial. And though it was doubtleſs an idle frolic, yet the heart was free from all ſort of guilt, even the guilt of negligence; and therefore the act ought to have been excuſed. And the ſame learned Judge determined accordingly in a caſe ſomething ſimilar. Upon a Sunday morning a man and his wife going to dine at a friend's houſe in the neighbourhood, he carried his gun with him, to divert himſelf on his way; but before dinner he diſcharged it, and ſet it up in a private place in his friend's houſe. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him; which was put into the room where his wife was, ſhe having brought it part of the way. He taking it up touched the trigger, and the gun went off, and killed his wife. It came out in evidence, that while the man was at church a perſon belonging to the family privately charged the gun, and went after ſome game; but before the ſervice at church was ended, returned it loaded to the place from whence he had taken it; and where the defendant, who was ignorant of all that had paſſed, found it to all appearance as he had left it. Mr. Juſtice Foſter thought it unneceſſary to inquire whether the man had examined the gun before he caried it home; but being of opinion upon the whole

Rampton's caſe, Kel. 41.

Foſt. 265.

Ch. V. § 40. *Accidents in unexpected occurrences.*

whole evidence that he had reaſonable grounds to believe that it was not loaded, he directed the jury that if they were of the ſame opinion, they ſhould acquit him: and he was acquitted.

§ 41. *At ſports and recreations.* Foſt. 259.

2. I now come to the conſideration of accidents which happen at ſports and recreations: if death enſue from ſuch as are innocent and allowable, the caſe will fall within the rule of excuſable homicide: but if the ſport be unlawful in itſelf, or productive of danger, riot, or diſorder, from the occaſion, ſo as to endanger the peace, and death enſue; the party killing is guilty of manſlaughter.

Foſt. 259. 1 MS. Sum. 131, 2. Dalt. ch. 148. 1 Hawk. ch. 29. ſ. 7. Keilw. 108. 136. Pult. de pace, 123.

It ſeems now the better opinion, that manly ſports and exerciſes which tend to give ſtrength, activity, and ſkill in the uſe of arms, and are entered into merely as private recreations amongſt friends, are not unlawful; and therefore perſons playing by conſent at cudgels (*a*), or foils, or wreſtling (*b*), are excuſable if death enſue. For though doubtleſs it cannot be ſaid that ſuch exerciſes are altogether free from danger; yet are they very rarely attended with fatal conſequences; and each party has friendly warning to be on his guard. And if the poſſibility of danger were the criterion by which the lawfulneſs of ſports and recreations were to be decided, many exerciſes muſt be proſcribed which are in common uſe, and were never heretofore deemed unlawful. And the reaſon given by Mr. Juſtice Foſter, for conſidering ſuch ſports as lawful, ſeems a good one; becauſe, ſays he, bodily harm is not the motive on either ſide; upon the ſuppoſition of which motive, Lord Hale had grounded his opinion to the contrary, and that the act in ſuch caſe amounted to manſlaughter. To which it may be added, that the weapons ordinarily made uſe of upon ſuch occaſions are not deadly in their nature, unleſs urged by a malicious and vindictive ſpirit.

1 Hale, 472.

Sir John Chicheſter's caſe, Alleyn, 12. Keilw. 108.

Upon this diſtinction, as to the nature of the weapon, Sir John Chicheſter's caſe ſeems to have turned; who unfortunately killed his man-ſervant as he was playing with

(*a*) *Vide* Comb. 408. (*b*) Rex v. Lane, Bodmin Sum. Aſſ. 1717, per Eyre, MS. Chapple, J. from Serjt. Forſter's MS.

him. Sir John paſſed at him with his ſword in the ſcabbard, which the latter parried with a bed-ſtaff; and in the heat of the exerciſe the chape of the ſcabbard flew off, and the ſervant was killed by the point of the ſword. Mr. Juſtice Foſter thinks, in conformity with Lord Hale, that there was evidently a want of common caution in making uſe of a deadly weapon in ſo violent an exerciſe, where it was highly probable that the chape might be beaten off, which would neceſſarily expoſe his ſervant to great bodily harm. It was therefore rightly adjudged to be manſlaughter. It has often been aſked, Wherein the difference lies between a ſword in the ſcabbard and a foil? Perhaps it is not much; but the latter is certainly better prepared for the prevention of accident than the point, though blunted, of the ſcabbard: and again, the foil is calculated to bend and yield when preſſed againſt the body, conſiderably more than the ſheathed ſword. And the increaſe of danger ſeems to ariſe as well from theſe circumſtances as from the probability of the chape being beaten off. The uſual and ordinary cautions, therefore, to avoid danger, were not uſed in that caſe, which are indiſpenſably required in order to reduce the homicide to miſadventure.

Ch. V. § 41. *At Sports, &c.*

Foſt. 260.

1 Hale, 473.

It ſeems alſo, that in caſes of friendly conteſts with weapons, which, though not of a deadly nature, may yet breed danger, there ſhould be due warning given that each party may ſtart upon equal terms. For if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death enſued; the want of due and friendly caution would make ſuch act amount to manſlaughter, but not to murder, becauſe the intent was not malicious.

But though the weapons be of a dangerous nature, yet if they be not directed by the perſons uſing them againſt each other, and ſo no danger to be reaſonably apprehended; if death caſually enſue, it is but miſadventure.

As, if perſons be ſhooting at game, or butts, or any other lawful object, and a by-ſtander be killed. And it makes no difference with reſpect to game, whether the party be qualified or not. But if the act be unlawful in itſelf, as ſhooting at deer in another's park, without leave, though in ſport

1 Hale, 38, 9. 472, 5. Foſt. 259. 1 Hawk. ch. 29. ſ. 6. 1 MS. Sum. 135. Ante, ſ. 35.

Ch. V. § 41. *At ſports, &c.*,

ſport and without any felonious intent, whereby a by-ſtander is killed, it will be manſlaughter: but if the owner had given leave, or the party had been ſhooting in his own park, it would only have been miſadventure.

§ 42. *Unlawful ſports. Prize-fighting, &c.* Foſt. 261. 1 MS. Sum. 131.

But the latitude given to manly exerciſes of the nature above deſcribed, when conducted merely as diverſions among friends, muſt not be extended to legalize prize fightings, public boxing matches, and the like, which are exhibited for the ſake of lucre, and are calculated to draw together a number of idle diſorderly people. For in ſuch caſes, the intention of the parties is not innocent in itſelf, each being careleſs of what hurt may be given, provided the promiſed reward or applauſe be obtained. And again, ſuch meetings have a ſtrong tendency in their nature to a breach of the peace. And therefore in Ward's caſe, who was challenged to fight by his adverſary for a public trial of ſkill in boxing, and were alſo urged to engage by taunts, although the occaſion were ſudden, yet having killed his opponent, he was holden guilty of manſlaughter.

Ward's caſe, O.B. June 1789, cor. Aſhburſt J.

Public jouſts. Foſt. 261.

The ſame conſiderations applied formerly to public jouſts and tournaments when they were in vogue: they drew together a great concourſe of unruly ſpirits, not always conſiſtent with the public tranquillity, and ſeldom ending without bloodſhed. Such aſſemblies therefore were deemed unlawful unleſs by the command of the king.

3 Inſt. 56. 160. 1 Hale, 473.

It is remarkable that in a ſtatute paſſed in the reign of Hen. 2., whereby it was enacted, that if at a jouſt or tournament, or at the play with ſword and buckler by the king's commandment, one killed another, it ſhould be no felony; the reaſon aſſigned is, "for that *in friendly manner* they "contended to try their ſtrength, and to be able to do the "king ſervice in that kind." It ſeemed neceſſary to legalize that ſort of conteſt by ſome ſuch proviſion, not only for the reaſons juſt before aſſigned, but becauſe the parties made uſe of deadly weapons from whence it was moſt probable that miſchief might enſue, however devoid of *malice*, in the popular ſenſe of the word, the conteſt might be.

Foſt. 261. 4 Blac. Com. 183.

The cuſtom of cock throwing at Shrovetide proceeds from a vicious and depraved inclination, is frequently productive of

of diſorders, and always dangerous to by-ſtanders. Therefore where a perſon throwing at a cock, miſſed his aim and killed a child who was looking on, Mr. Juſtice Foſter ruled it manſlaughter. For firſt, the motive is far from innocent; and next, the act is in itſelf likely to breed danger. And the ſame rule applies to any idle, dangerous, and unlawful ſport from whence death enſues. Ch. V. § 42. *At ſports, &c.*

§ 43. *Concluſion.*

From all that has been premiſed upon this ſubject it appears, that where the ſport itſelf is innocent which occaſions the death, the poſſibility of danger ariſing from it will not vary the caſe, and convert that which is a misfortune into an offence: yet that where danger may ariſe, due and ordinary caution, ſuch as is uſual under ſimilar caſes, ought to be uſed. That where the ſport itſelf is unlawful, or the motive improper, the offence will be thereby enhanced more or leſs according to the probability and greatneſs of the danger.

V. *Homicide from Neceſſity in Defence of a Man's own Perſon or Property, or of the Perſons or Property of others.*

§ 44. *Diviſion of ſubject.*

Herein may be conſidered, 1. What ſort of attack it is *lawful and juſtifiable* to reſiſt, even by the death of the aſſailant, and where the party is without any blame. 2. Where ſuch killing is only *excuſable*, or even *culpable*, and the party is not free from blame. 3. By whom ſuch a juſtification or excuſe may be urged. 4. How far ſuch neceſſity ſhall be ſaid to extend. 5. And laſtly will be conſidered certain caſes of imminent neceſſity founded on ſelf-preſervation, wherein no blame is imputable to either party.

In defence againſt felons. Foſt. 273. 1 Hawk. ch. 28. ſ. 21. 24. 1 Hale, 445. 481. 484, 5, 8. 493. 1 MS. Sum. 151. 4 Blac. Com. 180. Pult de pace, 121. b.

1. A man may repel force by force in defence of his perſon, habitation, or property, againſt one who maniſeſtly intends or endeavours, *by violence or ſurprize*, to commit a *known felony*, ſuch as murder, rape, robbery, arſon, burglary, and the like, upon either. In theſe caſes he is not obliged to retreat, but may purſue his adverſary until he has

Ch. V. § 44. *Againſt known felons.*

has ſecured himſelf from all danger; and if he kill him in ſo doing, it is called juſtifiable ſelf-defence: as on the other hand, the killing by ſuch felons of any perſon ſo lawfully defending himſelf will be murder. But a bare fear of any of theſe offences, however well grounded; as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of ſuch an intention; will not warrant him in killing that other by way of prevention: there muſt be an actual danger at the time.

1 Hale, 465.
1 Hale, 52.

1 Hale, 485, 6. Pult. de pace, 121, 2. Sum. 40. 1 Hawk. ch. 28. ſ. 23. Kel. 132. Dalt. ch. 127. ſ. 6. *Vide* poſt. ſ. 56.

There muſt be a *felony* intended; for if one come to beat another, or to take his goods, merely as a treſpaſſer; though the owner may juſtify the beating of him ſo far as to make him deſiſt; yet if he kill him, it is manſlaughter. But if the other had come to rob him, or take his goods as a felon, and were killed in the attempt, it would be juſtifiable in ſelf-defence.

24 H. 8. c. 5. 1 Hale, 487.

The ſtatute 24 Hen. 8. c. 5., which was made in affirmance of the common law, reciting, that it had been in doubt whether "if any perſon attempt felonioufly to rob "or murder any perſon in or near any common highway, "&c. or in their manſion-houſes, &c. or do attempt to "break any dwelling-houſe in the night-time, and ſhould "happen in ſuch their felonious intent to be ſlain by the "perſon ſo attempted to be robbed or murdered, or by any "perſon being in their dwelling-houſe ſo attempted to be "burglarioufly broken, &c. he ſhould forfeit his goods and "chattels; as any other perſon ſhould do that *by chance* "*medley* killed another in his defence; declares that ſuch "perſon, being indicted or appealed for the ſame, ſhall "upon his trial be fully acquitted and diſcharged, in "the like manner as if he had been acquitted of the death "of ſuch perſon." And there is an expreſs exemption by the ſtatute from any forfeiture. But though the ſtatute only mentions certain caſes, it muſt not be taken to imply an excluſion of any other inſtances of juſtifiable homicide which ſtand upon the ſame foot of reaſon and juſtice. Thus the killing of one who attempts the wilful burning of an houſe is free from forfeiture without the aid of this ſtatute. And though it only mentions the breaking the houſe

Vide ante, ſ. 7, 8, Poſt. ſ. 50.

Poſt. 276. 1 Hale, 487, 8. 4 Blac. Com. 180. 26 Aſſize, 23.

houſe in the night time; which I conceive muſt be intended of ſuch a breaking as is accompanied with a felonious intent; yet a breaking in the day time with the like purpoſe muſt be governed by the ſame rule. In like manner as a lodger or ſojourner in the houſe has been holden to be equally indemnified as the maſter in killing ſuch a felonious aſſailant.

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Cooper's caſe, Cro. Car. 544. Foſt. 274. Poſt. f. 57.

There ſeems however to be a diſtinction between ſuch felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken ſuch urgent neceſſity as will not allow of any delay, and others of a different ſort, if no reſiſtance be made by the felon; and therefore a party would not be juſtified in killing another who was attempting to pick his pocket. But if one pick my pocket, and I cannot otherwiſe take him than by killing him; this falls under the general rule concerning the arreſting of felons. The above is further confirmed by the term *known* felony, made uſe of in our books, which contra-diſtinguiſhes it from ſecret felonies; and ſeems to imply, that the intent to murder, raviſh, or commit other felonies, attended with force or ſurprize, ſhould be *apparent*, and not be left in doubt: for otherwiſe the party killing will not be juſtified. It muſt plainly appear, ſays Lord Hale, ſpeaking of a felonious attack upon B., by the circumſtances of the caſe, as the manner of the aſſault, the weapon, &c. that his life was in imminent danger, otherwiſe the killing of the aſſailant will not be juſtifiable ſelf-defence.

§ 45. *Not extending to ſecret felonies without force.*

1 Hale, 488. 4 Blac. Com. 180, 2. 11 Rep. 82. b.

MS. Burnet, 39.

Foſt. 274.

1 Hale, 484. Poſt. f. 58.

Yet ſtill if the party killing had reaſonable grounds for believing that the perſon ſlain had a felonious deſign againſt him, and under that ſuppoſition kill him; although it ſhould afterwards appear that there was no ſuch deſign, it will only be manſlaughter, or even miſadventure; according to the degree of caution uſed, and the probable grounds for ſuch belief. As where an officer, early in the morning, puſhed abruptly and violently into a gentleman's chamber in order to arreſt him, *not telling his buſineſs, nor uſing words of arreſt*; and the gentleman *not knowing that he was an*

§ 46. *Killing by miſtake on reaſonable ground for imputing felonious intention.*

1 Hale, 470. Foſt. 299.

Ch. V. § 46. *Againſt ſuppoſed felons.*

officer, under the firſt ſurprize, took down a ſword that hung in the chamber, and ſtabbed him: it was ruled manſlaughter at common law, though the defendant was indicted on the ſtatute of ſtabbing. It is to be inferred from the form of the indictment, and what is ſaid by Lord Hale, that the bailiff had no offenſive weapon in his hand from whence the party might reaſonably have preſumed that his life or property was aimed at; and therefore there ſeems to have been a manifeſt want of caution in not demanding the reaſon of ſuch intruſion by a ſtranger; eſpecially as ſome interval muſt have elapſed before the ſword was taken down and drawn.

(1 Jac. 1. c. 8.)

Brown's caſe, ante, f. 27.

In Brown's caſe before mentioned, if he had killed one of the keelmen who had aſſaulted him and his companion, under the ſame circumſtances as there occurred, it would have been manſlaughter; and therefore, though he killed another perſon by miſtake, who was guiltleſs of any offence towards him; yet the circumſtances being ſuch as might have reaſonably induced him to believe that the deceaſed was one of the keelmen, it was ſtill but the ſame degree of offence.

Levet's caſe, Cro. Car. 538. 1 Hale, 42. 474.

Upon an indictment againſt Levet, for the death of Frances Freeman, it appeared that the defendant being in bed and aſleep in his houſe, his maid-ſervant who had hired the deceaſed to help her to do her work, as ſhe was going to let her out about midnight, thought ſhe heard thieves breaking open the door; upon which ſhe ran up ſtairs to her maſter, and informed him thereof; who riſing ſuddenly and running down ſtairs with his ſword drawn, the deceaſed hid herſelf in the buttery, leſt ſhe ſhould be diſcovered. Levet's wife, obſerving ſome perſon there, and not knowing her, but conceiving ſhe had been a thief, cried out, *here they be that would undo us.* Thereupon Levet ran into the buttery *in the dark*, not knowing the deceaſed, but *taking her to be a thief*; and *thruſting with his ſword before him*, killed her. This was ruled to be miſadventure. Poſſibly, ſays Mr. Juſtice Foſter, it might have been better ruled manſlaughter, due circumſpection not having been uſed. But with great deference to ſo high an authority, the latter obſervation, upon which indeed the whole queſtion turns,

Foſt. 299.

turns, ſeems to require further conſideration before the judgment be impeached. It can hardly be taken upon the ſtate of the caſe, that *Levet* ſaw a defenceleſs woman ſtanding alone, in a ſituation incapable of harming him or his family; but the tranſaction is ſtated to have happened in the dark, upon a cry of thieves, a ſtranger diſcovered ſculking from obſervation; it not even appearing, that the perſon was perceived to be a woman, or that there might not be more than one perſon: on the contrary, what was ſaid by the wife, in the hearing of all parties, was rather calculated to impreſs the defendant with the belief that there were more. The very manner in which he made the attack beſpeaking his doubt upon it; for he advanced *in the dark, thruſting his rapier before him.* And even though it ſhould be deemed neceſſary under ſuch circumſtances of alarm to give warning to the party, which has never been holden, yet it ſeems to have been done in this caſe by what was ſaid by the wife, to all appearance in the hearing of the deceaſed, as well as of Levet; to which no explanation was even offered by the deceaſed. This therefore ſeems properly enough to be one of thoſe caſes mentioned by Lord Hale, where the ignorance of the fact excuſes the party from all ſort of blame. And Hawkins, in mentioning the caſe, ſays, that it ſeems the defendant may *juſtify* the fact under theſe circumſtances, inaſmuch as it has not the appearance even of a fault. Perhaps it is more properly *excuſable.*

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1 Hale, 42.

1 Hawk. ch. 28. ſ. 27.

MS. Burnet, 40. ad idem.

Sir William Hawkeſworth being weary of life, and willing to be rid of it by the hand of another; having firſt blamed his keeper for ſuffering his deer to be deſtroyed, and commanded him to execute the law; came himſelf into his park at night, as if with intent to ſteal the deer; and being queſtioned by the keeper, who knew him not, and refuſing to ſtand or anſwer, was ſhot by the keeper. This, ſays Lord Hale, was holden excuſable homicide by the ſtatute *de malefactoribus in parcis;* becauſe the keeper was in no fault.

1 Hale, 40.

Ante, f. 31.

So a commander coming upon a ſentinel in the night in the poſture of an enemy, to try his vigilance, is killed by him as ſuch: this is no offence, but miſadventure.

1 Hale, 42.

Ch. V. § 47.

§ 47. *Concerning apparency of intent to commit felony.*

Other caſes have occurred, wherein the queſtion has turned upon the apparency of the intent in one of the parties to commit ſuch felony as will juſtify the other in killing him. As in Mawgridge's caſe; who upon words of anger between him and Mr. Cope threw a bottle with great violence at the head of the latter, *and immediately drew his ſword:* on which Mr. Cope returned a bottle with equal violence; which, ſays Lord Holt, it was lawful and juſtifiable for Mr. Cope to do; for he who hath ſhewn that he hath malice againſt another is not fit to be truſted with a dangerous weapon in his hand. The words previouſly ſpoken by Mr. Cope could be no juſtification for Mawgridge; and it was reaſonable for the former to ſuppoſe his life in danger when attacked with ſo dangerous a weapon, and the aſſault followed up by another act indicating an intention of purſuing his life; and this at a time when he was off his guard, and without any warning. This latter circumſtance forms a main diſtinction between that caſe and the caſe of death enſuing from a combat, where both parties engage upon equal terms: for there, if upon a ſudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who firſt has recourſe to a deadly weapon ſuſpend his arm till he has warned the other, and given him time to put himſelf upon his guard; and afterwards they engage on equal terms; in ſuch caſe it is plain that the deſign of the perſon making ſuch aſſault is not ſo much to deſtroy his adverſary at all events, as to combat with him, and to run the hazard of his own life at the ſame time. And that would fall within the ſame common principle which governs the caſe of a ſudden combat upon heat of blood, which has been before treated of. But if ſeveral attack a perſon at once with deadly weapons, as may be ſuppoſed to have happened in Ford's caſe; though they wait till he be upon his guard; yet it ſeems (there being no compact to fight) that he would be juſtified in killing any of the aſſailants in his own defence; becauſe ſo unequal an attack reſembles more a deſire of aſſaſſination than of combat.

Mawgridge's caſe, Kel. 119. 128. 130. 9 St. Tr. 61. Foſt. 278. Ante, f. 25. S.C. 2 Ld. Ray. 1493. 1 Hawk. ch. 31. f. 28. Kel. 130. Ante, f. 24. Ante, f. 25.

In another caſe, however, where the aſſault, though a very violent one, was plainly with a view to chaſtiſe the party for his miſbehaviour, and there appeared no intent to aim

aim at his life; his killing the aſſailant was holden not to be lawful or excuſable under the plea of ſelf-defence. That was Nailor's caſe, tried before Holt C. J., Tracy J., and Bury B. The priſoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed: his father ordered him to go to bed, which he refuſed to do: whereupon a ſcuffle happened between the father and ſon. The deceaſed, who was then in bed, hearing the diſturbance, got up, threw the priſoner on the ground, and fell upon him and beat him; the priſoner lying upon the ground with his brother upon him, not being able to avoid his blows or make any eſcape from his hands. And as they were ſtriving together, the priſoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas term 1704, it was unanimouſly holden to be manſlaughter; for there did not appear to be any *inevitable neceſſity*, ſo as to excuſe the killing *in that manner*. The deceaſed did not appear to have aimed at the priſoner's life, but only to have intended to chaſtiſe him for his miſbehaviour to his father: and to excuſe homicide upon the ground of ſelf-defence, there muſt always appear to have been ſuch a degree of neceſſity as may reaſonably be deemed inevitable. At the conference in the above caſe Powell J. put the caſe; If A. ſtrike B. *without any weapon*, and B. retreat to a wall, and there ſtab A., that will be manſlaughter; which Holt Chief Juſtice ſaid was the ſame as the principal caſe: and that was not denied by any of the judges. For it cannot be inferred from the bare act of ſtriking, *without any dangerous weapon*, that the intent of the aggreſſor roſe ſo high as the death of the party ſtricken: and without there be a plain manifeſtation of a felonious intent, no aſſault, however violent, will *juſtify* killing the aſſaillant under the plea of neceſſity.

Ch. V. § 47. *Againſt expelled felony.*

Nailor's caſe, O. B. 1704. MS. Tracy. 1 MS Sum. 156. S. C.

Poſt f. 55. S. C.

§ 48. *Party juſt ſying killing on neceſſity muſt be wholly without fault.* 1 Hawk. ch. 28 f. 22. Ante, f. 34.

In no caſe can a man juſtify the killing of another under the pretence of neceſſity, unleſs he were wholly without any fault imputable by law in bringing that neceſſity upon himſelf. And therefore where A. with many others had on pretence of title forcibly ejected B. from his houſe; and B. on

Ch. V. § 48. *Party juſtifying muſt be blameleſs.*

on the third night returned with ſeveral perſons with intent to re-enter; and one of B.'s friends attempted to fire the houſe; whereupon one of A.'s party killed one of B.'s with a gun; held manſlaughter in A.; becauſe the entry and holding with force was illegal.

Caſe of Drayton Baſſet, 1 Hale, 440. 444.

1 Hale, 453. 1 Hawk. ch. 31. ſ. 25. Sum. 48.

If A. challenge B. who declines to fight, but lets A. know that he will not be beaten, but will defend himſelf: and B. going about his occaſions, and wearing his ſword, be aſſaulted by A. and killed; this is clearly murder. But if B. had killed A. upon that aſſault, it would have been ſe defendendo, if he could not otherwiſe have eſcaped, or bare manſlaughter if he might and did not. But if B. had only made this a diſguiſe to evade the law, and had purpoſely gone to a place where it was probable he ſhould meet A.; then it had been murder: but herein the circumſtances at the time of the fact done muſt guide the jury.

Kel. 58. 61. 128. Foſt. 277. 1 Hawk. ch. 31. ſ. 27. Pult. de pace, 122. b. Mawgridge's caſe, 9 St. Tr. 65.

Neither does it lie in the mouth of the party firſt making a felonious attack upon another, without any lawful provocation, to urge, even in alleviation, this plea of neceſſity in ſelf-defence, though perhaps it exiſted in fact. For if A. of malice prepenſe aſſault B. to kill him, and B. draw his ſword in his lawful defence and attack A., and purſue him, and then A. for his own ſafety give back and retreat to a wall; and B. ſtill purſuing him with his drawn ſword, A. to ſave his own life kill B.; this is murder in A.: for A. having attacked and endeavoured to kill B. upon malice in the firſt inſtance, he is anſwerable for all the conſequences of which he was the original cauſe. And the attack and purſuit of B. ſhall not excuſe him; becauſe it was lawful in B. to purſue A. until he was entirely out of danger; which he could not be ſaid to be ſo long as A. might renew his attack. A fortiori, the ſame rule holds if A. had merely feigned to retreat in order to give himſelf a colour for wreaking his malice againſt B. It is true that Lord Hale, in treating upon this ſubject, puts the caſe, that A. *by malice* makes a *ſudden* aſſault upon B., who ſtrikes again, and purſuing hard upon A., A. retreats to the wall, and in ſaving his own life kills B.: which he ſuppoſes would be only ſelf-defence; grounded upon the opinion of Dalton. But the caſe in Dalton is merely that of a ſudden affray:

2 Hale, 482.

2 Hale, 479, 480. Poſt. ſ. 54.

Dalt. ch. 150. ſ. 8.

and

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and in order to reconcile the above paſſage with all the other books, and with other paſſages of the ſame author, it muſt be underſtood that he is not ſpeaking of a felonious aſſault with malice by A., with intent to kill B. *unprepared;* but either ſuch an aſſault as could no way endanger him, or at leaſt upon mutual combat: and even then if the firſt aſſault were *with malice* in the legal underſtanding of the term, the opinion deſerves further conſideration, as will appear hereafter.

1 Hawk. ch. 29. f. 13.

Poſt. f. 54.

§ 49. *Officers of juſtice.*

With reſpect to officers of juſtice, and other perſons interfering to preſerve or reſtore the peace, who are bound to do their duty at all hazard, they will deſerve ſeparate mention in another place.

Poſt. f. 63, &c.

§ 50. *Excuſable ſelf-defence.*

2. I come next to conſider the principle of thoſe caſes where the killing in ſelf-defence is only excuſable, which Mr. Juſtice Foſter calls "*ſelf-defence culpable*, but through the benignity of the law *excuſable*:" which diſtinction he grounds upon this, that the neceſſity is in ſome meaſure founded upon the fault of the party urging it in his excuſe, which it is not in the caſes of *juſtifiable* ſelf-defence above conſidered. This excuſable ſelf-defence is diſtinguiſhed in the ſtatute 24 H. 8. c. 5. by the deſcription of "homicide upon *chance-medley* in ſelf-defence:" which word *chance-medley* is therein uſed in its ancient legal ſignification; and means, when death enſues from a combat between parties on a ſudden quarrel. And a difference is therein raiſed, reſpecting the forfeiture, between this ſpecies of ſelf-defence and that which is juſtifiable: the forfeiture ſtill remaining in the caſe of homicide upon chance-medley in ſelf-defence; though the party has now a pardon and writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame.

Foſt. 273, 5. 279.

24 H. 8. c. 5. Foſt. 275. 4 Blac. Com. 184. Ante, f. 7, 8. 24.

4 Blac. Com. 188. Foſt. 288.

§ 51. *Difference between chance medley and manſlaughter.*

It has been ſhewn, that where death enſues from a combat on a ſudden quarrel, without prepenſe malice, ſuch act amounts but to manſlaughter; being attributed to heat of blood ariſing from human infirmity. Now in order to reduce ſuch offence from manſlaughter to ſelf-defence upon chance-medley, it is incumbent on the defendant to prove two

Ante, f. 24.

Ch. V. § 51. *Excuſable ſelf-defence on combat.*

things; 1ſt, that before a mortal ſtroke given he had declined any further combat, and had retreated as far as he could with ſafety; 2dly, that he then killed his adverſary through mere neceſſity, in order to avoid immediate death. And it ſeems that any caſe, which without theſe two circumſtances would have amounted to more than manſlaughter, cannot by their concurrence be *excuſed* upon the foot of ſelf-defence upon chance-medley; though a paſſage of Lord Hale, which will be mentioned preſently, may ſeem to countenance an exception to this remark. With the general poſition however, above laid down, agrees Mr. Juſtice Blackſtone; who ſays, that the true criterion between homicide upon chance-medley in ſelf-defence and manſlaughter ſeems to be, that when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is guilty of manſlaughter: but if the ſlayer had not began to fight, or having began had endeavoured to decline any further ſtruggle, and afterwards being cloſely preſſed by his antagoniſt kill him to avoid his own deſtruction; this is homicide excuſable in ſelf-defence. And to the ſame effect Mr. Juſtice Foſter obſerves, that in *both* caſes it is ſuppoſed that paſſion had kindled on each ſide, and blows paſſed between the parties; but that in the caſe of manſlaughter, it is either preſumed that the combat on both ſides had continued to the time the mortal ſtroke was given; or that the party giving ſuch ſtroke was not at that time in imminent danger of death. My reaſon for dwelling ſo much upon this will appear when I come preſently to conſider Lord Hale's opinion on the ſubject.

Foſt. 277, 8. 1 Hale, 484. 1 MS. Sum. 155. 4 Blac. Com. 184. Pult. de pace, 122.

Poſt. c. 54.

4 Blac. Com. 184.

Foſt. 277.

Vide poſt.

§ 52. *Diſtinction between chance-medley and miſadventure.*

It has been further obſerved by Lord Hale, that in homicide in ſelf-defence it ſeems neceſſary for ſome *act* to be done by the party killing; for if he be *merely paſſive*, it will make it only a killing by miſadventure. But whether one of the inſtances he gives altogether comes up to the principle intended to be laid down might perhaps admit of diſpute. It is this; A. aſſaults B., who flies to the wall, or falls, *holding his ſword in his hand*, on which A. runs or falls violently, *without any thruſt or ſtroke offered at him by B.*; and is killed. This, he ſays, is by miſadventure. Now if the

1 Hale, 480. 1 Hawk. ch. 27. ſ. 4, 5.

the action of B. in holding up the ſword were voluntary, and intended for his defence, it ſeems a great degree of refinement to diſtinguiſh ſuch an act as that from an actual movement of B. towards his adverſary; ſuppoſing him to have been in no greater blame in bringing on the quarrel in the one caſe than in the other, and to be urged by the like imminent neceſſity for the preſervation of his life. Nor does this at all fall in with the definition before given of homicide by miſadventure. The other inſtance indeed put of B.'s falling with the inſtrument in his hand ſeems more like an involuntary act, and comes nearer to the notion of one *merely paſſive*; though if he had before drawn his ſword in his defence, inaſmuch as danger muſt neceſſarily reſult from ſuch an act and the very nature of the occaſion, perhaps there is ſtill no reaſon for making a diſtinction. For ſuch a difference once eſtabliſhed in this caſe may lead to others where it might be more important. But if the caſe here meant to be put be that of a felonious attack by A. upon B. without any manner of fault in the latter; then the difference lies merely in words: for whether B. defended himſelf by action, or merely by preſerving a paſſive guard, if I may uſe the expreſſion, is preciſely the ſame with reſpect to all legal conſequences; he would be equally entitled to an abſolute acquittal in both caſes.

Ch. V. § 52. *Excuſable ſelf-defence on combat.*

Ante, f. 8.

§ 53. *As to the firſt aſſault.* Foſt. 277. MS. Tracy, 42. Pult. de pace, 122. 1 Hale, 479. ante, f. 24.

As in the caſe of manſlaughter upon ſudden provocation, where the parties fight upon equal terms, *all malice apart*, it matters not who gave the firſt blow; ſo in this caſe of excuſable ſelf-defence, the firſt aſſault in a *ſudden affray*, *all malice apart*, will make no difference, *if either party quit the combat, and retreat before a mortal wound be given.* But Hawkins thinks this opinion is too favourable to the firſt aſſailant, even upon a *ſudden* quarrel; inaſmuch as the neceſſity was induced by his own fault. And Lord Hale ſeems to diſtinguiſh the caſe of him who is firſt attached from the aſſailant, with reſpect to the point of retreating. For if A. aſſault B. ſo fiercely that giving back would endanger his life; in which caſe it is agreed that the party thus attacked need not retreat in order to bring his caſe within the rule of neceſſity in ſelf-defence; or if in the aſſault B. fall to the ground, whereby he could not fly; in ſuch

1 Hawk. ch. 29. f. 17.

1 Hale, 482. Sum. 41.

1 Hawk. ch. 29. f. 14. 4 Blac. Com. 185. 3 Inſt. 56. Hale, ut ſupra.

Ch. V. § 53. *Excuſable ſelf-defence on combat.*

ſuch caſe if B. kill A. it is in ſelf-defence upon chance medley. But if B. had returned A.'s aſſault ſo fiercely that he could not retreat without danger; or if A. had fallen to the ground, and then had killed B. who was aiming at his life, ſtill this ſhould not be interpreted to be done in ſelf-defence upon chance medley; becauſe, as it has been ſaid, a fall not being voluntary as a flight is, it does not thereby appear that A. declined fighting; and therefore B. cannot ſafely quit the advantage he has gotten. So that in the caſe of the aſſailant there muſt be an actual unequivocal retreat and quitting of the combat as far as he can, in order to reduce the killing by him to ſelf-defence upon chance medley: and this his intention muſt not be ſhewn by any ambiguous or caſual act, ſuch as his falling; otherwiſe, as Lord Hale obſerves, all caſes of murders or manſlaughters would by interpretation be turned into ſelf-defences. Nor in any caſe will a retreat avail, if it be feigned in order to get an opportunity or interval by parting to enable him to take advantage of this excuſe. Yet at any rate I think there is great difficulty in applying the diſtinction above taken by Lord Hale and Hawkins againſt him who makes the firſt aſſault, to the caſe of mutual combat by conſent, though upon a ſudden occaſion, where neither of the parties makes an attack till the other is prepared; becauſe in theſe caſes it matters not who gives the firſt blow; it forms no ingredient in the merits of the queſtion.

Vide 1 Hale, 482. n.

Vide ſupra et ante, ſ. 24.

§ 54. *When the firſt aſſault is upon malice.*

In all the above caſes of excuſable ſelf-defence, it muſt be taken that the attack was made upon a ſudden occaſion, and not premeditated or with malice. For if one attacked another with a dangerous weapon unprepared, with intent to murder him, that would ſtand upon a different foot, as hath been ſhewn: and in that caſe, if the perſon whoſe life was ſought killed the other, that would be in ſelf-defence properly ſo called, which does not induce any forfeiture. But if the firſt aſſault be *upon malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for then the flight rather aggravates the crime, as it ſhews more deliberation.

Pult. de pace, 12. b.

Ante, ſ. 44.

Foſt. 277.

MS. Tracy. 42.

And

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And ſo, ſays Lord Hale, in ſome paſſages, where the parties appoint to fight; though one retreat as far as he can with ſafety before he kill the other, it is murder; *becauſe their meeting was a compact and an act of deliberation*; and therefore all that follows thereupon is preſumed to be done in purſuance thereof; *and he ſhall not take advantage of the neceſſity which he created by his own act.* But in another place he makes a *quære* even in that caſe, if it appeared that before the mortal wound the party killing had truly declined the fight, and offered to yield, or had actually run away as far as he could, but had been purſued by the other, who refuſed to decline the combat. And again, he puts the caſe of A. making a *ſudden* aſſault *by malice* upon B., who ſtriking again and purſuing hard upon A., A. retreats to the wall, and in ſaving his own life kills B.; this, he thinks, may be ſelf-defence upon chance medley. Some obſervation has already been made upon this latter paſſage, which may ſerve in ſome degree to reconcile it with other authorities: and it is evident that he does not there ſpeak of a *premeditated* combat, as in the firſt paſſage; becauſe he uſes the term of *ſudden* aſſault. It is equally difficult to conceive that by the term *malice* he could mean a pre-exiſting malice, in other words, that deliberate rancour of heart which is meant to be denoted by the term malice in its ſtrict legal ſenſe: for in the ſame place, he puts the caſe where A. and B., *between whom there was malice*, met *caſually*, and B. being aſſaulted and driven to the wall by A., killed him in his own defence; this, ſays he, is *ſe defendendo*, and ſhall not be heightened by the former malice into murder or man-ſlaughter; *for it was not a killing on account of the former malice, but upon a neceſſity impoſed upon him by the aſſault of A.* If this reaſoning be juſt, the other concluſion cannot be true, that if upon ſuch a malicious aſſault by A., B. had driven him to the wall, and then A. had killed B., it would only have been in ſelf-defence. Neither does this reaſoning apply in ſupport of the *quære* made by Lord Hale to the firſt poſition laid down by him, reſpecting a retreat from a deliberate and preconcerted combat; of which he had ſaid, that the party retreating could not avail himſelf; *becauſe he ſhould not take advantage of the neceſſity which he created by his own deliberate*

1 Hale, 452. 479. Ante, f. 12. 24.

1 Hale, 452. Burnet's MS. 42.

1 Hale, 479. 480.

Ante, f. 48.

Copſtone's caſe, 1 Hale, 479. 487.

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Ante, § 51.

deliberate act; namely, by the compact to meet and fight his antagoniſt. And it may be queſtioned how far that *quære* is reconcileable with other authorities. For in the paſſages before cited from Foſter and Blackſtone Js., they both reaſon upon the ſuppoſition, that in order to excuſe the perſon retreating upon the foot of ſelf-defence, the fighting muſt not have been upon malice; and that in all caſes where the two ingredients of the retreat before a mortal ſtroke, and the inevitable neceſſity, are wanting, the caſe would amount to manſlaughter; which clearly is not applicable to the caſe of deliberate duelling. Again, the very denomination of "ſelf-defence upon chance medley," to which, if excuſable at all, the death muſt be attributed in the inſtance put, does in its nature imply that the combat was *upon a ſudden occaſion* at leaſt, whether upon an old grudge or a new quarrel. Added to which, it is laid down generally in many books, that if a man aſſault another on malice prepenſed, and then fly to the wall, and there kill him *in his own defence*, he is guilty of murder in reſpect of his firſt intent. Blackſtone expreſsly puts the ſame caſe of a duel as Lord Hale had firſt done, but without ſubjoining the ſame doubt: and it was conſidered as ſettled law by the Chief Juſtice in delivering the judgment in Oneby's caſe. But at the ſame time it muſt be obſerved, that in ſome at leaſt of the other books referred to, the rule ſeems to have been more particularly referable to caſes, not of mutual combat, but of a previous felonious attack by one of the parties on the other, unprepared and without his aſſent, which the other afterwards reſiſted.

1 Hawk. ch. 29 ſ. 17. ch 31. ſ. 26. Foſt. 276, 7. Kel. 58. 128, 9. Sum. 42. 47. 4 Blac. Com. 185. 2 Ld. Ray. 1491.

Upon the whole, it may be difficult to make a diſtinction in ſtrictneſs of law between the caſe of him who makes a felonious attack with malice upon the life of another, armed and prepared by agreement to meet and reſiſt him, and the caſe of one who makes a ſimilar attack, without notice to his adverſary: and yet in eſtimating the real atrocity of the two caſes, there is no generous mind which could heſitate to pronounce on which ſide the advantage lay. Thus much, however, may be obſerved, that the reaſon why in the latter caſe flight ſhall not avail the aggreſſor is, becauſe after ſuch an attack he is not fit to be truſted ſo

long

long as by any reaſonable poſſibility he may renew the ſame attempt; and his opponent having a right by law to purſue him till he is out of all danger, the firſt cannot in conſequence have a contrary right to reſiſt. But when perſons meet upon compact to fight, that of itſelf preſuppoſes a degree of confidence in each other that neither will take any unfair advantage: and there, neither of them can have a right to purſue his adverſary in the ſame manner as in the other caſe: and conſequently, if one of them expreſsly renounce the unlawful compact, and give reaſonable grounds for inducing a belief that he no longer ſeeks to hurt his opponent; as the other has no legal authority for miſtruſting the truth of the offer, nor any right to purſue his advantage; ſo it may be urged that there is no reaſon why the law ſhould, after ſuch expreſs renunciation of the unlawful compact, with-hold from the firſt the general right of ſelf-defence; at leaſt none upon the ground of inconſiſtent rights, as in the other caſe. Yet ſtill it may be doubtful whether admitting the full force of this reaſoning, the offence can be leſs than manſlaughter; or whether in ſuch caſe the party can altogether excuſe himſelf upon the foot of neceſſity in ſelf-defence; becauſe the neceſſity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the firſt inſtance deliberately foreſeen and reſolved upon in defiance of the law: and ſo far it varies this caſe from that of a combat on a ſudden occaſion without malice, where both parties are preſumed to act without deliberation, under the immediate impulſe of paſſion, and blind to the conſequences.

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§ 55. *As to the exiſtence of the neceſſity to kill ſufficient to excuſe.* Ante, f. 50. and the authorities there cited.

As to the other point to be eſtabliſhed, namely, the exiſtence of the neceſſity under which the party killing endeavours to excuſe himſelf; he can in no caſe ſubſtantiate ſuch excuſe if he kill his adverſary, even after a retreat; unleſs there were reaſonable ground to apprehend that he would otherwiſe have been killed himſelf. And therefore where nothing appeared in Nailor's caſe above mentioned to ſhew that the deceaſed aimed at the priſoner's life; although he held him down on the ground beating him, and the priſoner could not avoid his blows; it was ruled manſlaughter. It

Nailor's caſe, Ante, f. 47.

is

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is to be noted in that caſe, that the priſoner ſtruck the mortal blow with a penknife, which was a dangerous, miſchievous weapon; from whence it was to be preſumed, that he intended to rid himſelf of the chaſtiſement, which his brother was then inflicting on him, by his death. Mr. Juſtice Foſter, in alluding to this caſe, ſeems to lay a ſtreſs upon the want of an inevitable neceſſity, ſo as to excuſe the killing *in that manner*. But if it appeared that a party who was engaged in ſuch an affray, without any fault of his own, had retreated as far as he could, [as in the above caſe, where he was thrown upon the ground, and the deceaſed was upon him,] or otherwiſe teſtified an intention to decline the controverſy; and then being hard preſſed, in mere defence of his perſon from the continued blows of his adverſary gave a blow with his *hand*, or in any other manner *not likely to kill*; and it may fairly be preſumed that he had no ſuch intention, but only to make him deſiſt; it rather ſeems that ſuch act, though death enſue, is either excuſable in ſelf-defence, or attributable to miſadventure; although the party's life were not in danger at the time. For no man is required by law to remain defenceleſs aud ſuffer another to beat him as long as he pleaſes without reſiſtance; although it be evident that the other did not aim at his life; but he may lawfully exert ſo much force as is neceſſary to compel him to deſiſt. Upon the ſame principle as governs the caſe, where the party upon an inſufficient provocation, ſuch as words, ſtrikes a blow which unfortunately and beſide his intention kills another; if it were with his hand or a ſtick or other weapon not likely to kill, it is but manſlaughter; which, had it been with a dangerous weapon, would have been murder. And it amounts to manſlaughter in the former caſe, becauſe the act of ſtriking at all is unlawful; but in the caſe now under conſideration, it is not unlawful for a man to ſtrike with or uſe whatever force may be ſufficient to prevent another from beating him, (ſhort of intentionally killing him, unleſs for the neceſſary preſervation of his own life,) provided he cannot eſcape from the blows by any other means, and did not bring upon himſelf ſuch ill treatment by his own illegal act. And therefore it may be a queſtion, whether, under ſuch circumſtances, the death may not be attributed to miſ-

Foſt. 278.

Infra.
Ante, f. 44.

Kel. 131.
Foſt. 292.

adventure

adventure; being unintentional in the party ſtriking, who was in that inſtance doing no more than he lawfully might. I ſay, to miſadventure rather than to homicide in ſelf-defence, becauſe this latter ſeems more properly to imply that the party ſtriking aimed at the life of the other, or intended him ſome great bodily harm, but that the fact is either juſtifiable or excuſable, being induced by neceſſity, and for the preſervation of his own life. The caſe put therefore, where the ſtriker does not aim at the other's life, nor does any act calculated in common experience to endanger it, but only intends to make him deſiſt from his unlawful aſſault by ordinary means, and in ſo doing unexpectedly happens to kill him, ſeems rather attributable to miſadventure, than to ſelf-defence upon chance-medley.

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In defence of Property.

§ 56. *In defence of property againſt treſpaſſers.* Ante, f. 44, 45.

With reſpect to attacks upon property, it has been ſhewn before, that it is lawful to repel even by the death of the aggreſſor any felonious attempt upon it, under the reſtrictions before noticed. But where a forcible attack is made upon the dwelling-houſe of another, *without any felonious intent*, but barely to commit a treſpaſs, ſome further caution is to be obſerved.

If A, in defence of his houſe kill B. a treſpaſſer, who endeavours to make an entry upon it, it is at leaſt common manſlaughter, unleſs indeed there were danger of his life. But if B. had entered into the houſe, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and aſſaulted him, and A. had killed him, (not being otherwiſe able to avoid the aſſault, or retain his lawful poſſeſſion,) it would have been in ſelf-defence. So it had been if B. had entered upon him and aſſaulted him firſt, though his entry were not with intent to murder him, but only as a treſpaſſer to gain the poſſeſſion. In ſuch caſe A. being in his own houſe, need not fly as far as he can, as in other caſes of ſelf-defence; for he has the protection of his houſe to excuſe him from flying; as that would be to give up the poſſeſſion of his houſe to his adverſary by his flight. But in theſe caſes the homicide is excuſable rather than juſtifiable; and therefore a forfeiture is incurred, but a pardon iſſues of courſe.

1 Hale, 445. 485, 6. Cook's caſe, Cro. Car. 537.

1 Hawk. ch. 28. ſ. 23. ante, ſ. 7.

On

Ch. V. § 56. *In defence of property againſt treſpaſſers.*

R. v. Willoughby and another, Bodmin Sum. Aſſ. 1791. MS.

On the other hand, if the owner of the houſe be killed in a ſtruggle between him and thoſe who unlawfully reſiſt his turning them out of his houſe, where they had no right to remain, it will be murder. Two ſoldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refuſed, alleging the unreaſonableneſs of the hour, and adviſed them to go to their quarters; whereupon they went away uttering imprecations. In an hour and a half afterwards, when the door was opened to let out ſome company who had been detained there on buſineſs, one of them ruſhed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the ſame anſwer: and on his refuſing to depart, and perſiſting to have ſome beer, and offering to lay hold of the landlord, the latter at the ſame inſtant collared him; the one puſhing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with ſome ſharp inſtrument from the other ſoldier, who had remained without, which occaſioned his death a few days afterwards. Mr. Juſtice Buller held this to be murder in both, notwithſtanding the previous ſtruggle between the landlord and one of them. For the landlord did no more in attempting to put the ſoldier out of his houſe at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken: more eſpecially as there was reaſonable evidence of the priſoners having come the ſecond time with a deliberate intention to uſe perſonal violence in caſe their demand for beer was not complied with.

Kel. 132. Foſt. 291. Ante, I. 22.

But where the treſpaſs is barely againſt the property of another, the law does not admit the force of the provocation ſufficient to warrant the owner in making uſe of any deadly or dangerous weapon. As if upon ſight of one breaking his hedges the owner take up an hedge ſtake, and knock him on the head and kill him; this would be murder; becauſe it was an act of violence much beyond the proportion of the provocation. And ſtill more where ſuch or the like violence is uſed after the party has deſiſted from the treſpaſs. But if the beating were with an inſtrument

or in a manner not likely to kill, it would only amount to manſlaughter: and it is even lawful to exert ſuch force againſt a treſpaſſer, who comes without any colour to take the goods of another, as is neceſſary to make him deſiſt. Ch. V. § 56. *In defence of property.* 1 Hale, 473-486.

3. *As to the perſons by whom ſuch juſtification or excuſe may be urged;* § 57. *Who may juſtify for injuries to another. Interfering againſt known felons.*

In all caſes where a felonious attack is made, a ſervant or any other perſon preſent may lawfully interpoſe to prevent the miſchief intended; and if death enſue, the party ſo interpoſing will be juſtified. Thus, in the inſtances of arſon or burglary, a lodger may lawfully kill the aſſailant in the ſame manner as the owner himſelf might do. This is ſubject however to the ſame limitations I before noticed. In this reſpect I ſee no difference between the caſe of the perſon aſſaulted and thoſe who come in aid againſt ſuch felons. And the legiſlature itſelf ſeems to have conſidered them on the ſame foot; for in the caſe of the Marquis de Guiſcard, who ſtabbed Mr. Harley ſitting in council, they diſcharged the party who gave the mortal wound from all manner of proſecution on that account; and declared the killing to be a *lawful and neceſſary action.* Foſt. 274. 1 Hale, 484, 5. 2 Hawk. ch. 12. ſ. 19. R. v. Cooper, Cro. Car. 544. Ante, ſ. 44, 45. 9 Ann. c. 16.

But the caſe of third perſons interfering in mutual combats or ſudden affrays, except as mediators to preſerve the peace, requires greater caution. Lord Hale puts this caſe: If A., B., and C. be walking in company together, and C. aſſault B. who flies, and is in danger of being killed from C.'s purſuit, unleſs preſent help be afforded; and A. thereupon kill C. in defence of the life of B.; it ſeems that in this caſe of ſuch an inevitable danger of the life of B., the killing of C. by A. is in nature of ſelf-defence: but then, he adds, it muſt plainly appear by the circumſtances of the caſe, as the manner of the aſſault, the weapon with which it was made, &c. that B.'s life was in imminent danger. It ſeems as if Lord Hale had doubted of the caſe of a ſtranger's interfering in the ſame manner, by having ſubjoined a *quære* to the next ſentence, where ſuch a caſe is put. But if the killing of B. by C. would have been murder; and on the other hand, the killing of C. by B. § 58. *Interfering in mutual combats or ſudden affrays between others.* 1 Hale, 484. Ante, ſ. 45.

Ch. V. § 58. *Interference of third perſons.*

would have been juſtifiable ſelf-defence; then I conceive clearly that the killing of C. by A. although a ſtranger, in defence of B., upon view of the imminent and otherwiſe unavoidable danger of his life, would alſo have been juſtifiable; becauſe the motive of his interference was laudable, namely, to prevent a felony which would otherwiſe have been committed. So if A. had interfered with a view to preſerve the peace between B. and C., giving due notice of his intention, and not with a view to take part with either; and had been under the neceſſity of killing C. in order to preſerve his own life or that of B., which could not otherwiſe be preſerved; it would equally have been juſtifiable: becauſe even private perſons are bound to prevent a felony being committed by all poſſible lawful means, without expoſing their own lives; though if their zeal carry them thus far, the law will not put them in a worſe ſituation on that account. But if A., a ſtranger, take part on a ſudden with either B. or C., who are engaged together in an affray, wherein both are in the eye of the law blameable, although perhaps in different degrees; and afterwards kill either, although in the neceſſary defence of the other; it cannot be leſs than manſlaughter: for he who thus officiouſly interferes without any previous knowledge of the merits of the diſpute, not to preſerve the peace but to partake in the broil, is himſelf highly culpable; having leſs provocation to heat his blood than probably the parties themſelves had who originally engaged in the diſpute. And therefore his caſe does in this reſpect ſtand in a far leſs favourable light than that of a friend or ſervant who have a prior intereſt in the ſafety of the perſon for whoſe ſake they interfere; or even than the caſe of a ſtranger who happened to be privy to the whole cauſe and progreſs of the diſpute. But ſuppoſe the killing of C. by B. would under the circumſtances have been clearly excuſable ſelf-defence; and on the other hand the killing of B. by C. would have been manſlaughter at leaſt: as where B. had declined a combat in which both had been ſuddenly engaged, and had retreated as far as he could with ſafety, but C. had perſiſted in the attack and put B.'s life in peril; and A. a ſtranger, not knowing the cauſe of the diſpute, had taken part with B.

1 Hale, 484.

Kel. 136.

B. and had ſlain C. in the neceſſary defence of B.: it ſeems that the merits of A.'s caſe ought rather to depend in part upon the actual ſituation of the combatants at the time he took part in the conteſt, than altogether upon the merit of B.'s, of which he was entirely ignorant; although B.'s merit would have great weight in the deciſion: which ſhould induce perſons to be extremely cautious how they interfere too haſtily in the diſputes of others, unleſs as mediators to preſerve the peace. And therefore if at the time of A.'s actual interference, the danger of B. was ſo urgent that A. could only prevent his death by killing C.; poſſibly under theſe circumſtances A. might excuſe the homicide upon the ſame neceſſity as B., although he engaged not ſo much to preſerve the peace between both as to aid B. in his neceſſity: but if he engaged with intent to part them, giving due notice, without deſigning to kill C., and was only induced thereto by the ſpeedy neceſſity which enſued, it would be even juſtifiable. On the other hand, if he took part with B. before the actual exiſtence of the neceſſity under which he was ſtruggling againſt C., and afterwards killed C. upon the urgency of B.'s danger; it is very much to be doubted whether he can *excuſe* himſelf afterwards upon the ground of a neceſſity, which was not the motive of his interference, and did not exiſt at the time that he engaged. For generally ſpeaking, if there be an affray, and an actual fighting and ſtriving between perſons, and another run in and take part with one party and kill the other; this is manſlaughter: and that, whether the quarrel between the two were ſudden or malicious, if the party interfering did not know it to be malicious. And the reaſon why B. would be excuſed in the caſe put, if at all, is becauſe he endeavoured to decline the combat, and could not for the fierce attack of C. upon him; but A. continued in the combat of his own accord; and if he did ſo, he could not excuſe the killing of C. upon the foot of neceſſity, although ultimately his own life might have been in danger; much leſs then can he excuſe it on the ground of B.'s neceſſity; for that was not the motive of his interference at firſt; and he had done no act as B. had done, to ſhew his inclination to abandon the affray, and that he only

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Kel. 61, 62.

1 Hawk. ch. 31. ſ. 35. 50. 1 Roll. Rep. 408. Kel 88. 113. 136. Pult. de pace, 124. b. Poſt. ſ. 89.

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continued in it afterwards to prevent a felony from being committed.

1 Hale, 438. 484. Sum. 52. Cro. Jac. 296. Kel. 88. 136. 1 Hawk. ch 31. ſ. 44. Plow 100. Poſt. ſ. 121.

If A. and B. fight upon malice, and C. the friend or ſervant of A., not being acquainted therewith, come in and take part againſt B. and kill him; this is murder in A., but only manſlaughter in C.: otherwiſe if C. had known that the fighting was upon malice; for then it would have been murder in both. But if A. had been aſſaulted, and had retreated as far as he could, and then his ſervant had killed the aſſailant; it would have been *ſe defendendo*. But if the ſervant had killed him before the maſter had retreated as far as he could, it would have been manſlaughter in the ſervant. And the law is the ſame in the caſe of the maſter killing the other in defence of the ſervant. But if there be only angry words between A. and B.; and C. the friend of A. ſtrike B. with a bowl or other dangerous inſtrument, and kill him; this would be murder.

Kel. 61. 136.

Vide poſt. ſ. 89.

Upon the whole, although Lord Hale and others appear ſometimes to intimate a diſtinction in theſe reſpects between the caſes of ſervants and friends, and that of a mere ſtranger; yet it muſt be confeſſed that the limits between both are no where accurately defined. And after all, the nearer or more remote connexion of the parties with each other ſeems more a matter of obſervation to the jury as to the probable force of the provocation, and the motive which induced the interference of a third perſon, than as furniſhing any preciſe rule of law grounded on ſuch a diſtinction.

§ 59. *Death of party interfering.* Kel. 66.

On this head of interference by a third perſon, it remains to be obſerved, that if two be fighting, and another interfere with intent to part them, but do not ſignify ſuch intent, and he be killed by one of the combatants; this is but manſlaughter: for the latter might think that he came in aid of his opponent, unleſs he had ſome notice of his real intent. And this rule holds even in the caſe of a peace-officer.

1 Hawk. ch. 31. ſ. 51.

Though generally ſpeaking, if ſuch a one or his aſſiſtant be killed in any affray, whether by thoſe at firſt engaged therein or by any others in aid of them, the caſe demands very different conſideration; which will be treated of at

Poſt. ſ. 63. 81.

large

large hereafter. It is for the moſt part murder in all concerned, where due notice has been given. Ch V. § 59. *Death of party interfering.*

Some judges have ſaid *arguendo*, that if two be fighting upon malice, and a ſtranger interfering to part them, and giving notice of his deſign, be killed by one of the combatants, it is murder in both; becauſe each intended to have killed the other: though other judges differed as to this concluſion: and Lord Hale in citing the caſe diſapproves of it to that extent, unleſs both ſtruck him. But it was clearly agreed to be murder in him who ſtruck, and alſo in the companions of that party. The like conſiderations will govern the caſe where a ſtranger, interfering to part two others fighting upon a ſudden occaſion, is ſlain by either. But then he muſt give ſpecial notice of his deſign, and act accordingly, otherwiſe the offence will not be more than manſlaughter, there being no previous malice, and the blood being heated in the affray.

Manſell and Herbert's caſe, Dy. 128 b. 1 Hale, 441. Ante, ſ. 12. 34.

Vide poſt. ſ.

4. How far the neceſſity ſhall be ſaid to extend.

§ 60. *Duration of the neceſſity*

Inaſmuch as the juſtification or excuſe of which I have been treating is founded on the plea of neceſſity, it will not in either caſe extend beyond the actual continuance of that neceſſity which alone warrants it. And therefore though the party upon whom a felonious attack is firſt made be not obliged to retreat, but may purſue the felon till he find himſelf out of danger; yet if the felon were killed after he had been properly ſecured, and there were no longer any apprehenſion of danger, ſuch killing would be murder. Though perhaps if the blood were ſtill hot from the conteſt or purſuit, it might be only manſlaughter, on account of the high provocation. Hawkins indeed ſays, that if a ſervant coming ſuddenly, and finding his maſter robbed and ſlain, fall on the murderer immediately and kill him, it may be juſtified; for he does it in the heat of his ſurprize, and under juſt apprehenſions of the like attempt on himſelf. But he adds, that in other circumſtances (which muſt be underſtood where he has no juſt reaſon to apprehend the like attempt on himſelf, and the fact is not recent,) he could not have juſtified the killing of ſuch an one, but ought to have apprehended him. The fact will be either

1 Hale, 485. 4 Blac. Com 185.

1 Hawk. ch. 28. ſ. 21.

Ch. V. § 60. *Duration of the neceſſity.*

either murder or manſlaughter, according to the circumſtances above alluded to.

§ 61. *Unfortunate neceſſity* 4 Blac Com. 186. 1 Hawk. ch. 28. ſ. 26.

5. *Neceſſity induced by mutual misfortune.*

There are beſides ſome caſes where neceſſity may be urged for the death of an innocent man, and renders the party *excuſable* without any culpability; or, as ſome leſs correctly have ſaid, *juſtifiable*; though the difference in ſuch caſes is not worth examination. As where two perſons being ſhipwrecked, and getting on the ſame plank; it is found not able to ſave them both, and one thruſts the other from it whereby he is drowned. Yet, according to Lord Hale, a man cannot even excuſe the killing of another who is innocent, under a threat however urgent of loſing his own life unleſs he comply. But if the commiſſion of treaſon may be extenuated by the fear of preſent death, and while the party is under actual compulſion, there ſeems no reaſon why this offence may not alſo be mitigated upon the like conſideration of human infirmity. But if the party might, as Lord Hale in one place ſuppoſes, have recourſe to the law for his protection againſt ſuch threat, it will certainly be no excuſe for committing the murder.

1 Hale, 51. 434. Ante, ſ. 12.

Vide ante, ch. 2. ſ. 15.

VI. *Homicide in the Advancement or Execution of the Laws.*

§ 62. *Introduction.*

This branch of the ſubject will comprehend not only the duties of the ſeveral officers and miniſters of juſtice, and of all thoſe who come in aid of them, with the extent of their ſeveral powers in the different caſes falling under their cognizance; but alſo the relative duty of the ſubject in each of thoſe inſtances: how far the one may juſtify or excuſe compulſion; to what extent the other may exert reſiſtance.

Trial by battle. 1 Hawk. ch. 28. ſ. 16.

With reſpect to the obſolete method of trial by battle, it may be diſmiſſed at once by obſerving, that if either of the champions killed the other, ſuch homicide was according to the barbarous notions of ancient juriſprudence reckoned juſtifiable, as being the juſt judgment of God.

It

(*In advancement of Law*).

Ch. V. § 63. *Protection of officers, &c.*

§ 63. *General principles. Protection of officers of justice, &c. against resistance.* Foſt. 270. 308. &c. 1 Hale, 457. Poſt. f. 67.

It may be premiſed generally, that where perſons having authority to arreſt or impriſon, or otherwiſe to advance or execute the public juſtice of the kingdom, and uſing the proper means for that purpoſe, are reſiſted in ſo doing, and the party reſiſting is killed in the ſtruggle; ſuch homicide is juſtifiable. And on the other hand, if the party having ſuch authority, and executing it properly, happen to be killed; it will be murder *in all who take a part in ſuch reſiſtance*: this being conſidered by the law as one of the ſtrongeſt indications of malice, an outrage of the higheſt enormity, committed in defiance of public juſtice againſt thoſe who are under its ſpecial protection. But if the officer or perſon endeavouring to make the arreſt had no legal authority for that purpoſe, or, which is the ſame thing, none be ſhewn to the court; then the killing him by the party againſt whom ſuch illegal violence is committed can only amount to manſlaughter. Withers, a common ſoldier, was indicted for murder in ſtabbing a ſerjeant in the ſame regiment, who had arreſted him for ſome alleged miſdemeanour, and was conducting him to priſon. The priſoner at firſt ſubmitted to go, but ſhortly after ran away. The ſerjeant overtook and collared him, inſiſting on his going with him: the priſoner refuſed to go: and during the altercation the ſerjeant having taken a ſtick out of the priſoner's hand and thrown it away, ſhortly after the latter drew the ſerjeant's ſword, and plunged it in his body, and killed him. The jury found him guilty of murder. The articles of war, under which the ſerjeant might have juſtified the arreſt, were not produced in evidence; and no other authority appearing for the arreſt, the judges were all of opinion that the conviction was wrong; for that an aſſault or reſtraint of liberty, (no provocation being ſought by the priſoner,) was ſufficient to reduce the offence to manſlaughter: and ſo it was ruled in Buckner's caſe, upon the ſtatute of ſtabbing. But it was agreed in Sir Charles Stanley's caſe, that if the party who is arreſted yield himſelf and make no reſiſtance, but others endeavour to reſcue him, and he do no act to declare his joining with them; if thoſe who come to reſcue him kill any of the bailiffs; this is murder in them, but not in the party

Rex. v. Withers, Stafford Sum. Aſſ. 1784, cor. Buller J. afterwards before all the judges in Mich. term following. MS. Gould and Buller Js.

Buckner's caſe, ante, f. 29.

Reſiſtance by third perſons. Sir Charles Stanley's caſe, Kel. 87. *vide* 1 Hale, 464, 5.

Ch. V. § 63. *Protection of officers, &c.*

(*Vide* Jackſon's caſe, poſt. p. 298.)

Vide ante, f. 58. Pcft. f. 83.

arreſted. Otherwiſe if he do any act to countenance the violence of the reſcuers; as in the principal caſe by having firſt fired at the bailiff, and afterwards throwing him down. So if a man be arreſted, and he and his company endeavour a reſcue; and while they are fighting, one who knows nothing of the arreſt coming by kill one of the bailiffs in aid of the perſon arreſted; he is guilty of murder: for a man muſt take the conſequences of joining in any unlawful act, ſuch as fighting; and his ignorance will not excuſe him where the fact is made murder by the law without any actual precedent malice, as in the caſe of killing an officer in the due execution of his office. But in another report of the ſame caſe it is ſaid to have been reſolved, that if one not knowing the cauſe of the ſtruggle interfered between the bailiff and the party arreſted, *with intent to prevent miſchief* (which appeared to be the caſe of Andrews) it was not murder in him, though the bailiff's aſſiſtant were killed by one of the reſcuers: and Andrews was afterwards acquitted by the jury.

R. v. Sir Chas. Stanſſie and Andrews, 1 Sid. 160. MS. Burnet, 46. accord.

At Hertford, temp. Will. 3. ad incipium. MS. Tracy, 53.

A. beat B. a conſtable, who was in the execution of his office, and they were parted; and then C. a friend of A. fell upon the conſtable and killed him in the ſtruggle: but A. was not engaged in this after he was parted from B. And it was holden by Holt, C. J. and Rookſby, that this was murder only in C.; and A. was acquitted, becauſe it was a ſudden quarrel, and it did not appear that A. and C. came upon any deſign to abuſe the conſtable.

Regina v. Wallis and others, O. B. 1703, cor. Holt C. J. et al. Juſt. Salk. 335.

But if A. who began the riot or affray, had ſtill continued in it till it ended in the death of the conſtable; though he did not commit the fact, he would be a principal murderer.

Officers protected eundo, morando, et redeundo. Foſt. 308. 1 Hale, 464.

This protection of the law extends to its officers, not only while actually engaged in the execution of their office at the ſcene of action, but alſo *eundo*, *morando*, *et redeundo*. And therefore if one come to execute his office, and meeting with great oppoſition retire, and in the retreat be killed; this will be murder. And on the ſame principle, if he meet with oppoſition, and be killed before he come to the place; ſuch oppoſition being intended to prevent his doing his duty; this will alſo amount to murder; however

ever the homicide might otherwiſe have admitted of alleviation. Ch. V. § 63. *Protection of officers, &c.*

But though it be not neceſſary that the officer ſhould retreat at all, yet he ought not to come to extremities upon every ſlight interruption, nor unleſs upon a reaſonable neceſſity, in order to execute his duty. And therefore where a collector having diſtrained for a duty laid hold of a maid-ſervant who ſtood at the door to prevent the diſtreſs being carried away, and beat her head and back ſeveral times againſt the door-poſt, of which ſhe died: although the court held her oppoſition to the officer to be a ſufficient provocation to extenuate the homicide; yet they were clearly of opinion that he was guilty of manſlaughter in ſo far exceeding the neceſſity of the caſe. And where no reſiſtance at all is made, and yet the officer kills, it will be murder. So if the officer kill the party after the reſiſtance be over, and the neceſſity has ceaſed, it is manſlaughter at leaſt; and if the blood had time to cool, it would, I conceive, be murder.

Caution neceſſary before officer kills another on reſiſtance.
1 Hale, 481. 489. 494.
2 Hale, 84.
Goffe's caſe, 1 Vent. 216.
MS. Tracy, 57.
Poſt. f. 74.

MS. Burnet, 31.

Again, perſons coming in aid of officers in the execution of their duty, and every man lending his aſſiſtance to a conſervator of the peace in the preſervation thereof, or attending for that purpoſe whether commanded or not, and even private perſons under certain circumſtances interpoſing to prevent miſchief in caſe of an affray, or uſing their endeavours to bring felons or ſuch as have given a dangerous wound to juſtice, are under the ſame protection as are the ordinary miniſters of juſtice.

§ 64. *Aſſiſtants.*
Poſt. 272. 309.
1 Hale, 461, 3.

Vide ante, f. 59.
Poſt. f. 72.

But in order to underſtand more thoroughly the powers and duties incident to the miniſters of juſtice, and thoſe who lend their aſſiſtance in the advancement of the laws in the ſeveral ſituations wherein they may be called upon to act, the ſubject may be conſidered in a three-fold point of view;

§ 65. *Diviſion of the ſubject. Powers and duties of officers in the ſeveral caſes.*

1. *Touching the arreſt of perſons.*

2. *Touching the ſafe cuſtody of perſons arreſted, and in confinement.*

3. *Touching the execution of criminals.*

1. *Touching*

(*In advancement of Law*).

Ch. V. § 66. *On arreſt for felony.*

I. *Touching Homicide on the Arreſt of Perſons.*

§ 66. *Arreſt. Introduction.*

The powers delegated by the law to its officers in this particular are proportioned to the urgency of the caſe; they are greater in caſes of felony than in matters of mere miſdemeanor; and leaſt of all in civil ſuits. It will be proper therefore to take ſeparate notice of each: after which I ſhall touch, fourthly, upon the peculiar caſe of preſſing. I ſhall then have occaſion to conſider, fifthly, how far the legality and formal execution of proceſs is material in any of thoſe caſes; and therein where doors may be broken open; and how far third perſons may avail themſelves of any defects in the proceſs or mode of executing the arreſt.

§ 67. *Arreſt on felony committed.* 1 Hale, 481. 489. 2 Hale, 75, 6. 91. 101, 2. Foſt. 271. 309. St. 9 Ann. c 16. 1 Hawk. ch. 28. ſ. 11. 2 Hawk. ch 12 ſ. 1. 4 Blac. Com. 180. 3 Inſt. 118. 220, 1. St. 3 H. 7. c. 1. Pult. de pace, 120. b. *Vide* Riot Act, poſt. p. 304.

1. *Homicide happening in the arreſt of perſons upon a felony done or ſuppoſed.*

If a felony be committed and the felon fly from juſtice, or a dangerous wound be given, it is the duty of every man to uſe his beſt endeavours for preventing an eſcape; and if in the purſuit the felon be killed, where he cannot be otherwiſe overtaken, the homicide is juſtifiable. This rule is not confined to thoſe who are preſent, ſo as to have ocular proof of the fact, or to thoſe who firſt come to the knowledge of it: for if in theſe caſes freſh ſuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of thoſe who began the purſuit are under the ſame protection of the law. The ſame rule holds if a felon after arreſt break away as he is carrying to gaol, and his purſuers cannot retake without killing him. But if he may be taken in any caſe without ſuch ſeverity, it is at leaſt manſlaughter in him who kills him: and the jury ought to inquire, whether it were done of neceſſity or not.

Ante, ſ. 53. Foſt. 272.

Rex v. Jackſon and others, Newgate Lent Vac. 26 Car. 2. 1 Hale, 464.

On the other hand, if the felons reſiſt and kill any of the purſuers, it will be murder in all who take part in ſuch reſiſtance. Upon a robbery committed by ſeveral, the party robbed raiſed hue and cry, and the country purſued the robbers. One of them turned on the purſuers, the reſt being in the ſame field and having often reſiſted them; and the one refuſing to yield, killed one of the purſuers.

It

Ch. V. § 67. *On arreſt for felony.*

It was ruled, 1ſt, that this was murder; becauſe the country upon hue and cry levied are authorized by law to purſue and apprehend the malefactors; and here was a felony committed, and that by the perſons purſued. 2dly, That although there were no warrant of a juſtice of peace to raiſe hue and cry, nor any conſtable in the purſuit, yet the hue and cry was a good warrant in law for the purſuers to apprehend the felons; and therefore the killing of any of the purſuers was murder. 3dly, That inaſmuch as all the robbers were of a company, and made a common reſiſtance, and ſo one animated the other, all thoſe who were of the company of the robbers in the ſame field, though at a diſtance from Jackſon who killed the purſuer, were principals. 4thly, That one of the malefactors having been apprehended and in cuſtody before the party was hurt was not guilty; unleſs it appeared, that after his apprehenſion he had animated Jackſon to commit the murder.

§ 68. *On purſuit of another by miſtake on felony committed.* Foſt. 318. 2 Hale, 490. 2 Hale, 78. 119.

Suppoſing a felony to have been actually committed, but not by the perſon ſuſpected and purſued, the law does not afford the ſame indemnity to ſuch as *of their own accord* engage in the purſuit, how probable ſoever the ſuſpicion may be: for an innocent perſon is not bound to take notice of a private man's ſuſpicion or authority. But in ſuch caſe the homicide by either party, whether in the flight or on reſiſtance, will amount to manſlaughter: the one not having uſed due diligence to be apprized of the truth of the fact; the other not having ſubmitted himſelf to juſtice; ſince if his caſe would bear it he might have reſorted to his ordinary remedy for the falſe impriſonment.

Vide Levet's caſe, ante, p. 274.

It ſeems that the ſame rule would govern the caſe of ſuch as purſue of their own accord upon miſtaken information that a felony had been committed; but clearly not if it were urged as a pretence.

Arreſt upon authority by miſtake. Foſt. 318. 1 Hale, 489, 490. 1 Hawk. ch. 28. 118. 4 Inſt. 177.

But if a peace-officer, or indeed any other perſon ſpecially delegated, have a warrant (*a*) from a proper magiſtrate for the apprehending of B. *by name*, upon a charge of felony; ſ. 12. 2 Hawk. ch. 12. ſ. 16, 17. ch. 13. ſ. 11. 3 Inſt.

(*a*) And by ſtat. 22 G. 2. c. 44. ſ. 6. if the warrant be formal in the frame of it the officer executing it miniſterially is indemnified, though the magiſtrate iſſuing it exceed his juriſdiction.

or

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or if B. ſtand indicted for felony; or if the hue and cry be duly levied againſt B. *by name*; or if he eſcape after having been legally arreſted (and laying hold of the priſoner and pronouncing words of arreſt is an actual arreſt; and indeed without actually laying hold of him, if he had before ſubmitted to the arreſt): in theſe caſes if B. though innocent fly, or turn and reſiſt, and in the purſuit or ſtruggle be killed by ſuch peace-officer or ſpecial bailiff, or his aſſiſtants, or by any perſon joining in the hue and cry; the perſon ſo killing will be indemnified. For theſe perſons were, in the ſeveral inſtances put, in the diſcharge of a duty required from them by law, and ſubject to puniſhment in caſe of a wilful neglect of it. As on the other hand, if any of theſe be killed by B. it will be murder in him and any of his accomplices joining in that outrage.

(Genner v. Sparks, Salk. 79. 6 Mod. 173. Cole v. Cameron, M. 32 Geo. 3. B. R.)

Ante, ſ. 67.

Lord Hale indeed thinks that what has been ſaid above with reſpect to the arreſt of perſons ſtanding indicted for felony, againſt whom no warrant can be produced at the time, muſt be underſtood of arreſts by officers who are ſuch *virtute officii*, and have ſuch a ſpecial duty impoſed upon them; and does not extend to arreſts by private perſons of their own authority. Hawkins, who alludes to the ſame power of arreſt by officers in this inſtance, alleges this reaſon for it; becauſe there is a charge againſt the party on record. If this were all, it would not readily occur why officers only could take notice of a charge on record. But the diſtinctions I have before noticed between officers and private perſons are founded on this principle, to diſcourage perſons from proceeding to extremities upon their own private ſuſpicion or authority. On which account a private man is not bound to act in this caſe as in ſome others which have been mentioned; and therefore the law does not hold out the ſame indemnity to him; but his entire juſtification muſt depend upon the fact of the party's guilt, which at his peril he muſt make out, otherwiſe he will at leaſt be guilty of manſlaughter. Whereas conſtables and other peace-officers are *ex officio* not merely permitted but enjoined by law to arreſt the parties, as well on probable ſuſpicion of felony, as in caſe of felony actually committed; and this is a ſuſpicion grounded on the higheſt authority, namely,

2 Hale, 84, 5. *Sed vide* 1 Hale, 489, 490.

1 Hawk. ch. 28. ſ. 12.

2 Hale, 83. 92.

2 Hale, 85. 87. 91. 3.

Ch. V. § 68. *On arrest for felony.*

namely, the finding of the fact by the grand inquest on oath. Still however it may be urged that if the fact of such indictment found against the party be known to those who endeavour to arrest him in order to bring him to justice, it cannot be truly said that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons, if it may be made without the death of the felon. And if the fact of his guilt be necessary for their complete justification, I conceive that the bill of indictment found by the grand jury would for that purpose be *primâ facie* evidence of the fact, till the contrary were proved.

Dalt. ch. 170. f. 5.

§ 69. *Constable acting on information of private person.*

If a private person suspect another of felony, and lay such ground of suspicion before a constable, and require his assistance to take him, the constable may justify killing the party if he fly, though in truth he were innocent. But in such case, where no hue and cry is levied, certain precautions must be observed: 1. The party suspecting ought to be present; for the justification is that the constable did aid him in taking the party suspected. 2. The constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. From whence it should seem that there ought to be a reasonable ground shewn for it: otherwise it would be immaterial whether such information were given to the constable or not, as to the point of his justification. And it was formerly supposed to be necessary that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril. But in *Samuel* v. *Payne* and others, it was determined that a peace-officer might justify an arrest on a charge of felony on reasonable suspicion, without a warrant; although it should afterwards appear that no felony had been committed; but that a private individual in such a case could not. The reason of this is apparent; for if, as Lord Hale observes in one place, the constable cannot judge whether the party be guilty or not till he come to his trial, which cannot be till he be apprehended; (which he thinks a sufficient reason for justifying him in killing the party accused,

2 Hale, 79, 80. 91, 2, 3. 3 Inst. 221. Sum. 36, 7. Ledwith v. Catchpole, E. 23 G. 3. Cald. 291. 11 St. Tr. 321.

Samuel v. Payne, Doug. 359. 1 MS. Sum. 92.

2 Hale, 93. and vide ib. 84. 89.

if

Ch. V. § 69. *On arreſt for felony.*

if he fly from the arreſt and cannot otherwiſe be overtaken, however innocent he may afterwards appear to have been;) ſo it muſt be equally impoſſible for the conſtable to aſcertain whether a felony were actually committed or not: but in moſt caſes he muſt take both the one and the other upon the credit of the party who lays the charge before him. Therefore all that can in reaſon be required of him is that he ſhould inform himſelf as well as he can of the circumſtances; and that the relation of the party ſhould appear credible. And it is the duty of all perſons to ſubmit themſelves to the known officers of the law.

Under what circumſtances doors may be legally broken open in the ſeveral caſes of felony done or ſuppoſed, in miſdemeanors, and in civil ſuits, will be ſhewn at large hereafter.

Poſt. f. 87.

2. *As to arreſts in caſes of miſdemeanor and breach of the peace.*

§ 70. *On arreſt for miſdemeanors.* Poſt. 271. 1 Hale, 53. 481. 495, 6. 2 Hale, 117. 1 MS. Sum. 143.

It is not lawful to kill the party accuſed if he fly from the arreſt, though he cannot otherwiſe be overtaken, and though there be a warrant to apprehend him; and generally ſpeaking it will be murder; but under circumſtances it may amount only to manſlaughter, if it appear that death was not intended. But, as in caſe of felony, ſo here, if the officer meet with reſiſtance and kill the offender in the ſtruggle, he will be juſtified; and if he be killed, it will be murder. And he is bound at common law and by the ſtat. 17 Ric. 2. c. 8. to ſuppreſs all riots, and is puniſhable if he neglect it. In ſome inſtances however of flight in caſes of flagrant miſdemeanors, ſuch as the one before mentioned of a dangerous wound given, and ſome others which will be remarked, the ſame extremity may be reſorted to if the party cannot be otherwiſe overtaken: but this is founded upon a preſumption that the offence may turn out to be felony. The like ſeverity is juſtifiable againſt treſpaſſers come to hunt in legal foreſts, parks, chaſes, or warrens, who will not ſurrender themſelves on demand to the keepers; but fly, and cannot otherwiſe be overtaken: and if the keeper be killed it is murder.

On a dangerous wound given. Ante, f. 67. 3 H. 7. c 1.

Treſpaſſers in foreſts. S. de Maleſ. in Parc. 21 E. 1. ſt. 2. 3 & 4 W. & M. c. 10. f. 5. 1 Hale, 491. 1 Hawk. ch. 28. f. 15. 9 St. Tr. 315. 4 Blac. Com. 180. Ante, f. 31. Comyn. Rep. 16. 2 Roll. 120. Palm. 546.

It

Ch. V. § 70. *On arreſt for miſdemeanor.*

It is ſaid by Hawkins and others, that every private perſon may by the common law arreſt any ſuſpicious night-walker, and detain him till he give a good account of himſelf. Lord Hale carries the matter ſomewhat farther, and ſays, that if peace-officers meet with night-walkers or perſons unduly armed, whom by ſtat. 2 Ed. 3. c. 3. and 5 Ed. 3. c. 14. they are required to apprehend till morning that they may be examined, and who will not yield themſelves, but reſiſt or fly before they are apprehended, and they are upon neceſſity ſlain, becauſe they cannot be otherwiſe overtaken; it is no felony in the officers or their aſſiſtants; though the parties killed were innocent. But unleſs there were a reaſonable ſuſpicion of felony, in ſuch a caſe, it may be a matter of doubt at this day whether ſo great a degree of ſeverity would be either juſtifiable or neceſſary, eſpecially in the caſe of bare flight. Both thoſe ſtatutes were levelled againſt particular deſcriptions of offenders who roved about the country in bodies in a daring manner. In Tooley's caſe it was conſidered, that the taking up of a perſon in the night as a night-walker and diſorderly perſon, though by a lawful officer, would be illegal, if the perſon ſo arreſted were innocent, and there were no reaſonable grounds of ſuſpicion to miſlead the officer. And in a MS. note of that caſe given by the editor of Lord Hale, Lord Holt is made to ſay, that of late conſtables had made a practice of taking up people only for walking the ſtreets; but he knew not whence they had ſuch an authority. But it has been holden that one may be indicted for being a common night-walker, as for a miſdemeanor.

Nightwalkers.
2 Hawk. ch. 13. ſ. 6. ch. 8. ſ. 38. *vide* 2 Inſt. 52. 1 Roll. Rep. 237. Latch. 173. Poph. 208. 9 Co. 68 b. 2 Hale, 85. 97.

Tooley's caſe, 2 Ld. Ray. 1302. Poſt. ſ. 89.

2 Hale, 89. (n *f*).

Latch. 173. Poph. 208. 2 Hawk. ch. 8. ſ. 38.

§ 71. *Breaches of the peace in view of the conſtable or part: interpoſing;*

A conſtable or other known conſervator of the peace may lawfully interpoſe upon his own view to prevent a breach of the peace, or to quiet an affray; and if he or any of his aſſiſtants, whether commanded or not, be killed, it will be murder in all who take part in the reſiſtance; there being either implied or expreſs notification of the character in which he interpoſed. What will amount to implied legal notification will be ſeen hereafter.

1 Hale, 463. 1 Hawk. ch. 31. ſ. 44. Poſt. 310, 311. Kel. 66. Poſt. ſ. 81.

But

Ch. V. § 71. *On arreſt for miſdemeanor.*

But private perſons interpoſing in the caſe of ſudden affrays, to part the combatants or prevent miſchief, muſt undoubtedly give expreſs notice of their friendly intent: after which ſhould they be aſſaulted by either of the combatants, and in the ſtruggle ſhould happen to kill him, this will be juſtifiable homicide. But if the party ſo interpoſing with ſuch notice ſhould be killed by either of the affrayers, it will be murder in the perſon ſo killing; but not in the other, unleſs he had alſo ſtruck him.

Foſt. 272. 311. Kel. 66. 115. 1 Hawk. ch. 31. ſ. 45. 2 Inſt. 52. Staunf. 13.

1 Hale, 442.

In the caſe of a riot or rebellious aſſembly the peace-officers and their aſſiſtants, endeavouring to diſperſe the mob, are juſtified both at common law and by the riot act 1 Geo. 1. c. 5. in proceeding to the laſt extremity in caſe the riot cannot otherwiſe be ſuppreſſed. And Hawkins ſeems to think that this power extends alſo to private perſons acting of their own accord, if they cannot otherwiſe quell the riot; upon the ground that it is every man's duty to interfere for the preſervation of the peace, and to arm himſelf for that purpoſe. And this was ſo reſolved by all the judges in Eaſter term, 39 Eliz.; though they thought it more diſcreet for every one in ſuch a caſe to attend and aſſiſt the king's officers in ſo doing.

1 Hale, 53. 494, 495. MS. Tracy, 36.

1 Hawk. ch. 28. ſ. 14.

Poph. 121.

Peace-officers taking oppoſite parts. 1 Hale, 460.

But where two conſtables took oppoſite parties in an affray, and one of them was killed; this was ruled to be only manſlaughter; notwithſtanding each had enjoined the other party to deſiſt: and it was not murder, ſays Lord Hale, inaſmuch as each had as much authority as the other. Perhaps it had been better expreſſed to have ſaid, that inaſmuch as they acted not ſo much with a view to keep the peace as in the nature of partiſans to the different parties, they acted altogether out of the ſcope of their characters as peace-officers, and without any authority whatever. For if one having a competent authority iſſue a lawful command, it is not in the power of any other, having an equal authority in the ſame reſpect, to iſſue a command contrary to the firſt; for that would be to legalize confuſion and diſorder. And therefore, ſays Lord Hale, if the ſheriff having a writ of poſſeſſion againſt the houſe and lands of A.; and A. pretending it to be a riot upon him,

Ibid.

gain

gain the conſtable of the vill to aſſiſt him, and to ſuppreſs the ſheriff or his bailiff; and in the conflict the conſtable be killed; this is not ſo much as manſlaughter: but if any of the ſheriff's officers be killed, it is murder; becauſe the conſtable had no authority to encounter the ſheriff's proceeding or acting by virtue of the king's writ.

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Upon theſe principles a caſe was ruled by Mr. Juſtice Heath upon an indictment for an aſſault and reſcue; where the ſheriff's officers having apprehended a man by virtue of a writ againſt him, a mob collected and endeavoured by violence to reſcue the priſoner. In the courſe of the ſcuffle, which was at ten o'clock at night, one of the bailiffs having been violently aſſaulted ſtruck one of the aſſailants, a woman, and as it was thought for ſome time had killed her: whereupon and before her recovery was aſcertained the conſtable was ſent for, and charged with the cuſtody of the bailiff who had ſtruck the woman. The bailiffs on the other hand gave the conſtable notice of their authority, and repreſented the violence which had been previouſly offered to them; notwithſtanding which he proceeded to take them into cuſtody upon the charge of murder, and at firſt offered to take care alſo of their priſoner; but the latter was ſoon reſcued from them by the ſurrounding mob. And the woman having recovered, the bailiffs were releaſed by the conſtable the next morning. Heath J. was clearly of opinion, that the conſtable and his aſſiſtants were guilty of the aſſault and reſcue, and directed the jury accordingly (*a*).

Exeter Sum. Aſſ. 1793.

§ 72. *Arreſt by conſtable for breach of peace out of his view.*

It has been often in queſtion how far a conſtable, or other peace officer, is warranted in arreſting one upon a charge by another of a mere breach of the peace after the affray is ended and the peace reſtored, without a ſpecial warrant from a magiſtrate. The better opinion however ſeems to be that he hath no ſuch authority. Certainly not, as for the purpoſe of impriſoning or compelling the party to find

2 Inſt. 52. 2 Hawk. ch. 12. ſ. 20. and ch 13. ſ. 8. 2 Ld. Ray. 1301. Strickland v. Fell, Dalt. ch. 1. & 7. Maidſtone Sum. Aſſ. 1787, cor. Gould J. MS. Skarret's caſe, T. 35 Eliz.

(*a*) The jury however acquitted the defendants.

Ch. V. § 72. *On arreſt for miſdemeanor.*

ſureties (*a*). Yet Lord Hale (*b*), and ſome later authorities, have holden that he may arreſt the party upon the charge of another, though the affray be over, for the purpoſe of bringing him before a juſtice to find ſureties or for appearance. But where time and circumſtances will admit of it, the better way is to apply to a magiſtrate for a warrant. It ſeems clear however that if one menace another to kill him, upon complaint thereof to the conſtable forthwith, he may, in order to avoid the preſent danger, arreſt the party and detain him till he can conveniently bring him to a juſtice of the peace. But this power is grounded on the duty of the officer to prevent a probable felony, and muſt be governed by the ſame rules which apply to that caſe; though Dalton extends it even to the prevention of a battery.

2 Hale, 88.

Dalt. ch. 116. ſ. 3.

§ 73. *Arreſt on proceſs.* Foſt. 311. Poſt. ſ. 78. 80, 81.

In the caſe of arreſts upon proceſs, whether by writ or warrant, if the officer named in the proceſs give notice of his authority, and reſiſtance be made, and he be killed; it will be murder; if in fact ſuch notification were true, and the proceſs legal; for after ſuch notification the parties oppoſing the arreſt acted at their own peril.

3. *As to Arreſts in civil Suits.*

§ 74. *Arreſt in civil ſuits.* 1 Hale, 481. 1 Hawk. ch. 28. ſ. 18. 20. Foſt. 271. 1 MS. Sum. 143.

In civil ſuits, if the party againſt whom the proceſs has iſſued fly from the officer endeavouring to arreſt him, and be killed by him in the purſuit, Lord Hale thinks it is murder: but Mr. Juſtice Foſter ſays it will be murder or manſlaughter as circumſtances vary the caſe. For if the officer in the heat of the purſuit, and merely in order to overtake the defendant, ſhould trip up his heels or give him a ſtroke with an ordinary cudgel or other weapon *not likely to kill*, and death ſhould unhappily enſue; this will not amount to more than manſlaughter. The blood was heated in the purſuit, and no ſignal miſchief intended. But if he made uſe of a deadly weapon, it will amount to murder. The miſchievous vindictive ſpirit determines the nature of the offence. I

(*a*) Yet Lord Coke ſays (4 Inſt. 265.) that a conſtable may take ſurety of the peace by obligation.

(*b*) 2 Hale, 90. Handcock v. Sandham and others, Sittings after Hil. 1785, at Weſtm. cor. Ld. Mansfield. And Williams v. Dempſey, Guildh. Sitt. after Mich. 1787. cor. Buller J. MS.

doubt

Ch. V. § 74. *Arreſt in civil ſuits.*

doubt whether Lord Hale, or any of the writers on the ſame ſubject, meant to carry the doctrine further; though they may not have expreſſed themſelves ſo guardedly as Mr. Juſtice Foſter has done. It rather ſeems that Lord Hale intended only to ſpeak of the officer's intentionally killing the defendant in his flight, not being able to overtake him. The caſe of a defendant flying after an arreſt actually made, or out of cuſtody in execution for debt, ſeems alſo to be governed by the ſame rules. But certainly, in caſe of reſiſtance made, the perſon having authority to arreſt may repel force with force, and need not give back; and if death unavoidably enſue in the ſtruggle, he will be juſtified: as on the other hand the killing him will be murder: and the caſe in Rolle, where the officer was holden guilty of manſlaughter, becauſe in ſuch caſe he had not firſt given back as far as he could before he killed the party who had eſcaped out of cuſtody in execution for a debt, and reſiſted being retaken, ſeems to ſtand alone, and has been diſapproved of. In all theſe caſes, however, the party muſt have ſome notification of the officer's buſineſs.

Vide 1 Roll R. 18).

Foſt 270, 1. 1 Hale, 481. 494. 3 Inſt. 55. 1 Hawk. ch. 28. ſ. 17. 18.

Ante, ſ. 63.

1 Roll. Rep. 189. *Vide* ante, ſ. 63.

But no private perſon can of his own authority arreſt in civil ſuits.

1 Hawk. ch. 28. ſ. 19.

4. *Preſſing.*

§ 75. *Preſſing.*

There are yet two other occaſions wherein the arreſt and detention of perſons of a particular deſcription may be juſtified for the ſafety of the ſtate; one of theſe is in the caſe of mariners, who are legally impreſſed to ſerve on board his majeſty's ſhips of war: and the other in caſe of danger from invaſion or inſurrection, when the crown has a right to require the perſonal ſervice of every man capable of bearing arms. Of the former right, which is and always has been in common exerciſe, it is to be obſerved; 1. That the right of impreſſing for the ſea ſervice is confined to mariners (*a*). 2. There muſt be a legal warrant. 3. It muſt, as in other caſes, be executed by a proper officer. The two laſt points will be conſidered in their proper places.

See the argument of Mr. J. Foſter when Recorder of Briſtol in the caſe of Alexander Broadfoot, Foſt. 154.

1 Hawk. ch. 22. ſ. 2. Ex parte Softly, E. 41 G. 3. 1 Eaſt's Rep. 466. 1 Ed. 3. c. 5. 11 H. 7. c. 1. 16 & 17 Car. 1. c. 28. Dixon's caſe, poſt. f. 80.

Poſt, ſ. 76. 79.

(*a*) The preſs-warrant, as appears by Rex v. Softly, 1 Eaſt's Rep. 466. extends in terms to "ſeamen, ſeafaring men, and others whoſe occupations and callings are "to work in veſſels and boats upon rivers." And ſee there the conſtruction put upon theſe words.

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If there be a proper officer with a legal warrant to impreſs, and the party endeavoured to be taken, being a fit object of that ſervice, refuſe to ſubmit, and reſiſt, and kill the officer or any of his aſſiſtants, they doing no more than is neceſſary to impreſs the mariner, and overcome the reſiſtance; it follows by every legal analogy that ſuch a caſe would amount to murder. On the other hand, if the party attempted to be preſſed be killed in ſuch ſtruggle it ſeems juſtifiable, provided the reſiſtance could not otherwiſe be overcome; and the officer need not give way, but may freely repel force by force. And if the right of preſſing do not ſtand on this firm foot, it were better abandoned altogether, than by putting officers on performing a ſervice to which an oppoſition is partially encouraged, thereby to promote bloodſhed and diſorder inſtead of duty and ſubmiſſion to the law. But in caſe the party fly, the killing by the officer in the purſuit to overtake him would be manſlaughter at leaſt, and in ſome caſes murder, according to the rules which govern the caſe of miſdemeanors; paying attention nevertheleſs to thoſe uſages which have prevailed in the ſea ſervice in this reſpect, ſo far as they are authoriſed by the Courts which have ordinary juriſdiction over ſuch matters, and are not expreſsly repugnant to the laws of the land.

Ante, p. 302. 307.

Poſt. p. 312.

Rex v. Phillips, Cowp. 832.

An officer in the impreſs ſervice put one of his ſeamen on board a boat belonging to one William Collyer, a fiſherman, with intent to bring it under the ſtern of another veſſel in order to ſee if there were any fit objects for the impreſs ſervice on board. The boat ſteered away in another direction; and the officer purſued in another veſſel for three hours, firing ſeveral ſhots at her with a muſket loaded with ball *for the purpoſe of hitting the hallyards and bringing the boat to*, which was found to be the uſual way; one of which ſhots unfortunately killed Collyer. The Court ſaid it was impoſſible for it to be more than manſlaughter. This I preſume was on the ground that the muſquet was not levelled at the deceaſed, nor any bodily hurt intended to him. But inaſmuch as ſuch an act was calculated to breed danger, and not warranted by law, though no bodily hurt were intended, it was manſlaughter; and the defendant was burned in the hand.

5. Next

5. Next comes under conſideration *how far the legality of proceſs or formality in the manner of making the arreſt may be material upon queſtions of homicide on arreſts*: and herein ſeveral matters are to be attended to. Ch. V. § 76. *Legality of proceſs, and formality of the arreſt.*

§ 76.

1. That the Court or perſon from whom the proceſs iſſues has a competent juriſdiction and authority. 2. That the proceſs itſelf, be it by writ or warrant, be ſo far legal that it be not defective in the frame of it. 3. That the party executing the proceſs or making an arreſt virtute officii, be a lawful officer for that purpoſe, or an aſſiſtant to ſuch; and that there be due notification thereof. 4. That the proceſs be executed or arreſt made duly and according to law; and herein, where doors may be broken open. 5. How far a defect in any of theſe particulars may be urged by a third perſon who officiouſly interferes to prevent the arreſt. Ante, f. 66. 73. 1 MS. Sum. 163.

§ 77. *Juriſdiction legal.*

1. Lord Coke ſays, that a conſtable endeavouring to arreſt by warrant from the High Commiſſion Court being killed in the attempt, it was only ſe defendendo in the party; for the conſtable had no lawful authority. But this has been doubted by good advice; and it has been thought with more propriety that it would be manſlaughter; becauſe there was no neceſſity for recurring to ſuch an extremity. And this ſeems to be now ſufficiently eſtabliſhed by Withers's caſe before mentioned. The warrant in truth makes no difference on ſuch an occaſion; but the caſe ſhould be judged upon its own merits, independent of that fact. Simpſon's caſe, 4 Inſt. 333. 1 MS. Sum. 163. Foſt. 311. 9 Co. 68. *Vide* Cook's caſe, poſt. Withers's caſe, ante, p. 233. MS. Tracy. 42.

By the ſtat. 24 Geo. 2. c. 44. ſ. 6. If the warrant be regular in the frame of it, the officer executing it miniſterially is indemnified againſt any action for damages by the party injured, though the magiſtrate by whom it was iſſued exceeded his juriſdiction. 24 Geo. 2. c. 44. *Protecting officers executing warrants.*

§ 78. *Proceſs legal in its frame.*

2. It is ſufficient if the proceſs itſelf be legal in the frame of it, and iſſue in the ordinary courſe of juſtice from a court or perſon having juriſdiction in the caſe. No error or irregularity in the previous proceeding will affect it, or excuſe the party killing the officer in the execution of it from the guilt of murder. And therefore if a capias ad ſatisfaciendum, fieri facias, writ of aſſiſtance, or any other writ of the like 1 MS. Sum. 167. Foſt. 311. 1 Hale, 457. 1 Hawk. ch. 31. ſ. 56. 9 Co. 68, 9.

Ch. V. § 78. *Legality of proceſs and arreſt.*

like kind, iſſue directed to the ſheriff, and he or any of his officers be killed in the execution of it; upon an indictment for this murder it is only neceſſary to produce the writ or warrant, without ſhewing the judgment or decree: for however erroneouſly the proceſs iſſued, the ſheriff muſt obey, and is juſtified by it. And ſo it was ruled by Lord Hardwicke in the caſe of Rogers. So though the cauſe be not expreſſed with ſufficient particularity, the officer is juſtified if enough appear to ſhew that the magiſtrate had juriſdiction over the ſubject matter. This muſt however be underſtood of a warrant containing all the eſſential requiſites of one.

R. v. Rogers, Cornwall Sum. Aſſ. 1735. 1 MS. Sum. 164. 1 Hale, 460.

Falſity of charge immaterial. 1 MS. Sum. 164.

In all kinds of proceſs both civil and criminal, the falſity of the charge contained in ſuch proceſs, that is, the real injuſtice of the demand in the one caſe, or the party's innocence in the other, will afford no matter of alleviation for killing the officer: for every man is bound to ſubmit himſelf to the regular courſe of juſtice. And therefore where an eſcape warrant had been obtained improperly and by perjury, it was ruled not the offence of him who killed the officer in attempting to execute it. But if the proceſs be defective in the frame of it; as if there be a miſtake in the name, or addition of the party; or if the name of the party or of the officer be inſerted without authority, and after the iſſuing of the proceſs; and the officer in attempting to execute it be killed; this is only manſlaughter in the party whoſe liberty is invaded.

Curtis's caſe, Holt. 135.

Foſt. 312. 1 Hale, 457. Cro. Car. 371. W. Jones, 346.

R. v. Stockley, 1772. Serjt. Foſter's MS. 1 Hale, 457.

The priſoner Stockley, about Lady day 1753, had been arreſted by Welch the deceaſed, at the ſuit of one Bourn, but was reſcued; and afterwards declared, that if Welch offered to arreſt him again he would ſhoot him. A writ of reſcue was made out at the ſuit of Bourn, and carried to the office of Mr. Deacle, who acted for the under-ſheriff of Staffordſhire, to have warrants made out on the ſame. The under-ſheriff's cuſtom was to deliver to Deacle ſometimes blank warrants, ſometimes blank pieces of paper under the ſeal of the office, to be afterwards filled up as occaſion required. Deacle made out a warrant againſt Stockley upon one of theſe blank pieces of paper, and delivered it to Welch, who inſerted therein the names of Thomas Clewes and William Davil on the 12th of July 1753. On the 19th of September

tember following Welch, Davil, Clewes, and Howard to whom Stockley had declared he would ſhoot Welch, went to arreſt Stockley on this warrant. Clewes and Davil having the warrant went into the priſoner's houſe firſt, and called for refreſhment; but an alarm being given that Welch was coming, the door was locked: upon which Clewes arreſted the priſoner on this illegal warrant; who thereupon fell upon Clewes, and thruſt him out of doors, but kept Davil within, and beat him very dangerouſly, he crying out murder. On hearing this Welch and Howard endeavoured to get into the houſe, and Welch broke open the window, and had got one leg in, when Stockley ſhot and killed him. The priſoner abſconded, and was not apprehended till December 1771. He was tried at the Lent aſſizes following for murder, when the jury found expreſsly that the deceaſed attempted to get into the houſe to aſſiſt in the arreſt of Stockley. Howard, Clewes, and Davil, being dead, their depoſitions before the coroner were read; and minutes were taken of the above facts for a ſpecial verdict; but to ſave expence they were referred to the judges of B. R. (but not argued;) who certified that the offence amounted in point of law only to manſlaughter. The priſoner was thereupon branded and impriſoned nine months.

Ch. V. § 78. *Legality of proceſs and arreſt.*

The practice of iſſuing blank warrants, which occurred in the above caſe, has been very general, and is highly reprehenſible. To ſay the leaſt of it, it withdraws from the miniſters of juſtice that protection which the law when properly executed was meant to afford them; and thereby holds out a temptation to future reſiſtance. Upon the occaſion juſt mentioned it ſerved as a cloak to ſcreen a deſperate and atrocious offender from the puniſhment which he ſo well merited. It is true, that his ignorance of the defect in the warrant at the time did not vary the caſe in ſtrictneſs of law: but there was this additional circumſtance in his caſe which may deſerve to be well weighed, that he had before deliberately reſolved upon ſhooting Welch in caſe he offered to arreſt him again, which in all probability it might be his duty to do. This was relied on by ſome of the judges in Curtis's caſe, as indicative of premeditated malice and cruelty, and therefore ſufficient of itſelf to warrant a con-

Blank warrants illegal.

Vide Curtis's caſe, Foſt. 137, 8. ante 320.

Ch. V. § 78. *Legality of proceſs and arreſt.*

viction for murder, independant of the legality of the warrant, which was there however holden to be legal. The practice I have alluded to was lately reprobated in a caſe of a ſimilar nature; where the ſheriff having directed a warrant to A., by name, and all his other officers; B.'s name (another of the ſheriff's officers) was inſerted after the warrant was ſigned and ſealed by the ſheriff; and therefore an arreſt by B. was holden illegal.

Fouſin v. Barrow, M. 35 G. 3. 6 Term Rep. 122. poſt.

§ 79. *Preſs warrants. Vide* Foſt. 154. &c. ante, ſ. 75.

With regard to preſs-warrants, they have in modern times been iſſued from the board of Admiralty, grounded upon an order of his Majeſty in council; and are directed to ſome one particular officer, who is therein directed not to intruſt any perſon with the execution of it but a commiſſioned officer, whoſe name and office ſhall be inſerted on the back of the warrant.

§ 80. *Arreſt by a legal officer.* 1 MS. Sum. 169. 1 Hale, 457. 459. Ante, ſ. 76. Gordon's caſe, poſt. ſ. 81.

3. The party taking upon him to execute proceſs, whether by writ or warrant, muſt be a legal officer for that purpoſe, or an aſſiſtant to ſuch, and he muſt give due notification of his buſineſs. If he be a conſtable or other known officer de facto, acting within his diſtrict, it is ſufficient without proving his appointment and ſwearing in. If an officer make an arreſt out of his proper diſtrict, or have no warrant or authority at all; as if his name be inſerted after the iſſuing of the writ or proceſs without lawful authority; he is no legal officer, nor entitled to the ſpecial protection of the law: and therefore if he be killed by the party injured in the ſtruggle, it is only manſlaughter. On the other hand, if the ſuppoſed officer purpoſely kill the other party for not ſubmitting himſelf to ſuch illegal arreſt, it will generally ſpeaking be murder: that is, in all caſes at leaſt where an indifferent perſon acting in the like manner without any ſuch pretence would be guilty to that extent.

O. B. 13 Oct. 1690, Rokeby's MS. cited in Serjt. Foſter's MS.

Thus a warrant having been directed from the Admiralty to Lord Danby to impreſs ſeamen, one Browning his ſervant, *without any warrant in writing*, impreſſed one who was no ſeaman, who trying to eſcape was killed by Browning: adjudged murder.

So in Walter Dixon's caſe, the captain of the Royal Sovereign man of war had a warrant for impreſſing mariners, upon which a deputation was indorſed in the uſual form to one Stafford, a lieutenant. The mate of the Royal Sovereign, together with the priſoner Dixon and ſome others, but without either the captain or lieutenant, impreſſed one Anthony How, who never was a mariner, but was ſervant to a tobacconiſt. How made ſome reſiſtance, and for that purpoſe drew a knife which he held in his hand; whereupon Dixon with a large walking-ſtick, about four feet long and a great knob at the end of it, gave How a violent blow on the ſide of his head, of which he died in about fourteen days. This was adjudged murder: for in this caſe the capture and detention of How were unlawful on two accounts; firſt, becauſe neither the captain or lieutenant were preſent, and Dixon was no lawful officer for that purpoſe, or aſſiſtant to ſuch. Secondly, becauſe How was not a proper object to be impreſſed. Under theſe circumſtances it was lawful for How to defend himſelf; and Dixon's killing him in conſequence of an unlawful capture and detention was murder.

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Dixon's caſe, Kingſton Aſſ. 1756, cor. Deniſon, J. 1 MS. Sum. 170. [ſaid to be 1758, in Serjt. Foſter's MS.]

In Borthwick's caſe, where a preſs warrant had been directed to lieutenant William Palmer, enjoining all mayors, &c. to aid and aſſiſt him, *and thoſe employed by him* in the execution thereof; and he had given *verbal* orders to the defendant and ſeveral others to impreſs certain ſeafaring men of whom he had received intelligence: ſuch delegation was holden to be clearly bad; and the execution of the warrant by the priſoners, Palmer not being there, illegal. In that caſe it was expreſsly found to be the conſtant uſage and invariable cuſtom of the navy for all commiſſioned officers having in their cuſtody ſuch preſs warrants to give verbal orders to ſuch petty officers (of whom there was one amongſt the priſoners in this caſe) whom they may think fit to employ upon the impreſs ſervice; and that ſuch petty officers uſually act without any other authority than ſuch verbal orders. No ſtreſs however could be laid on an uſage directly repugnant to the laws of the land.

Borthwick's caſe, Dougl. 207.

Ante, 308.

In Alexander Broadfoot's caſe before mentioned, the lieutenant of the preſs-gang, to whom the execution of it was properly deputed, having remained in King Road in the port

Broadfoot's caſe, 1743, Foſt. 154. ante,

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port of Briſtol while his boat's crew went ſome leagues down the channel in the boat by his directions to preſs ſeamen; and in the furtherance of that ſervice one of the preſs-gang being killed by a mariner on board a veſſel which they boarded with intent to preſs thoſe whom they found there, though before any perſonal violence offered by the preſs-gang; it was holden to be only manſlaughter. But if a warrant be directed to ſeveral, any of them may execute it.

1 Hale, 459.

Officer acting out of his juriſdiction. 1 Hale, 458, 9. ante, ſ. 51. 55.

In like manner, if proceſs be executed out of the juriſdiction of the court from whence it iſſues, the killing the officer attempting to enforce the execution of it upon the party would be only manſlaughter. But if the proceſs be directed to a particular conſtable by name, or even by his name of office, and he execute it within the juriſdiction of the court or magiſtrate iſſuing the ſame, although it be out of the conſtable's vill, that will be ſufficient.

2 Hawk. ch. 13. ſ. 27. 30. *Vide* Tooley's caſe, poſt. ſ. 89.

§ 81. *Due notice to the parties.* Ante, ſ. 71. 80.

But further, the parties upon whom proceſs is to be executed muſt have due notice of the officer's buſineſs, in order to make their reſiſtance in the higheſt degree criminal. And unleſs there be ſome notification to them in one or other of the ways after mentioned, the killing of the officer upon reſiſtance made againſt the arreſt will not be murder. Thus where a bailiff puſhed abruptly and violently into a gentleman's chamber early in the morning in order to arreſt him, but not telling his buſineſs or uſing words of arreſt; and the party not knowing that the other was an officer, in the firſt ſurprize ſnatched down a ſword which hung in his room and killed the bailiff, this was ruled to be manſlaughter.

1 Hale, 470. O. B. 1657, Foſt. 298. ante, ſ. 46.

Foſt. 310, 311. 1 Hale, 4 0, 1, 2. Kel. 66. 115.

With regard to ſuch miniſters of juſtice who in right of their offices are conſervators of the peace, and in that right alone interpoſe in the caſe of riots and affrays, it is neceſſary in order to make the offence of killing them amount to murder, that the parties concerned ſhould have ſome notice of the intent with which they interpoſe: otherwiſe the perſons engaged may in the heat and buſtle of an affray imagine that they come to take a part in it. But in theſe caſes a ſmall matter will amount to a due notification. It is ſufficient if the peace be commanded, or the officer in any other manner declare

declare with what intent he interpoſes. Or if the officer be within his proper diſtrict, and known or but generally acknowledged to bear the office he aſſumes; or if in order to keep the peace he produce his ſtaff of office, or any other known enſign of authority, the law will preſume that the party killing had due notice of his intent, eſpecially if it be in the day-time. In the night indeed, when ſuch enſigns of authority cannot be diſtinguiſhed, ſome further notification is neceſſary; and commanding the peace, or uſing words of the like import notifying his buſineſs, will be ſufficient. Theſe kinds of notification by implication of law hold alſo in caſes where ſuch officers, having warrants directed to them as ſuch to execute, are reſiſted in the attempt. And therefore in Thomas Gordon's caſe, who was indicted for the murder of George Linnell, conſtable of Pattiſhall, in the execution of his office, in attempting to arreſt the priſoner in his own houſe, by virtue of a warrant obtained againſt him from a juſtice of peace, at the inſtance of one Pratt, for an aſſault, which warrant had been directed to *the conſtable of Pattiſhall*, and delivered by Pratt to the deceaſed to execute as conſtable of the pariſh: it appearing that the deceaſed at the time he went to the priſoner's houſe in the day-time to execute the warrant had his conſtable's ſtaff with him, and gave notice of his buſineſs; and further, that he had before acted as conſtable of the pariſh, and was generally known as ſuch. At a conference of all the judges on this caſe, they were of opinion that this was ſufficient evidence and notification of his being conſtable; although there were no proof of his appointment, or of his having been ſworn into the office.

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Poſt. f. 84.

Gordon's caſe, Northampton Sp. Aſſ. 1789, cor. Thomſon B. MS. Buller J. poſt. f. 122. S.C.

26th June 1789.

So ſays Lord Hale; if the officer be demanded he muſt ſhew his warrant; but if he doth it virtute officii as conſtable, &c. it is ſufficient to notify that he is conſtable, or that he arreſts in the king's name.

1 Hale, 583. Mackally's caſe, 9 Co. 69. Poſt. f. 84.

§ 82. *Notice to ſome and not to others.*

But it is alſo ſaid in the books, that if there be a ſudden affray, and the conſtable come in, and endeavouring to appeaſe it be killed by one of the company who knew him; (by which to be ſure muſt be underſtood the ſame ſort of knowledge as has been before expreſſed;) it is murder in that one,

1 Hale, 438. 446. 461. Kel. 115, 116.

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one, and in the reſt who knew the conſtable and abetted the other in the fact: but if they knew him not, it would be only manſlaughter in them, though murder in thoſe who did know him. And if others continuing in the affray neither knew the conſtable nor abetted to his death, they would not be guilty even of manſlaughter; though Lord Hale (perhaps over cautiouſly if in truth there were no abetment) expreſſes ſome doubt of this. But if the affray had been deliberately engaged in, if the parties had engaged to make a common cauſe and to maintain it by force, and the conſtable or any other perſon oppoſing them in it had been killed, it would have been murder in all; as is ſhewn more at large in another place. Yet the doctrine of implied malice ſeems to be carried further in Young's caſe; where it is laid down, that if upon an affray the conſtable or others in his aſſiſtance come to ſuppreſs it and preſerve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were ſudden; becauſe he ſet himſelf againſt the juſtice of the realm. In order however to reconcile this with other authorities, it ſeems that the party killing muſt have had *implied* notice of the character in which the peace officer and his aſſiſtants interfered, though not a perſonal knowledge of them.

Ante, f. 32.

Young's caſe, 4 Co. 40. b. 3 Inſt. 52.

1 Hawk. ch. 31. ſ. 51, 52, 53. Kel. 87. 4 Co. 40. b.

It is however agreed, that if a bailiff or other officer be reſiſted in the regular diſcharge of his duty in executing proceſs againſt a party, and a third perſon, even the ſervant or friend of the party reſiſting, come in and take part againſt the officer and kill him, it will be murder, though he knew him not.

How far theſe authorities are ſtrictly reconcileable is fit to be inquired into. And perhaps it muſt be underſtood in the latter caſe mentioned, that in order to make it murder in the ſervant or friend, the party whom they came in to aſſiſt muſt have had due notice of the officer's authority; and that if the offence would not have been murder in the party himſelf reſiſting, for want of ſuch notice, neither would it in the caſe of the ſervant or friend under the like ignorance. So in the caſe of a deliberate breach of the peace, all the perſons acting upon the ſame deſign muſt abide the conſequences

quences

quences of each other's acts; and therefore the knowledge of one will be the knowledge of all, and the wilful reſiſtance of one to the officer the wilful reſiſtance of all. But in the caſe of a *ſudden* affray, which is the caſe firſt put by Lord Hale, where there is no joint engagement to ſtand by each other in the proſecution of ſome unlawful act, there each man's caſe ſtands more upon its own particular merits, and ſhall be judged ſimply upon what the party intended to do, and actually did. Therefore if one in a *ſudden* affray neither knew the conſtable in the manner before ſtated, nor actually abetted to his death, he ſhall not be charged therewith. But if he actually abetted any perſon who had ſuch knowledge of the officer, then his caſe ſeems at firſt ſight not diſtinguiſhable from that of the ſervant or friend who come in ſuddenly and aſſiſt one who is knowingly reſiſting an officer in the execution of proceſs, and muſt according to the rule which governs that caſe abide the conſequences: and yet the books do make a diſtinction between them, though the occaſion with reſpect to the friend or ſervant interfering without notice be as ſudden as the caſe put of the affray in which the conſtable interferes. The ground of the diſtinction, if any, between theſe two caſes ſeems to be, that thoſe who are already engaged with others in an affray may in the heat of action reaſonably ſuſpect that one who interferes againſt them, without declaring or otherwiſe manifeſting his purpoſe, is come in aid of their opponents; and if the occaſion be ſudden, and there be no illegal concert, each man's caſe, as I before obſerved, ſtands more upon its own ground: and as it would only have been manſlaughter if the party not knowing the conſtable had killed him in the affray with his own hand, ſo his caſe cannot be made worſe by his caſually and ignorantly abetting another who did know him in the ſame act. Whereas one who wilfully engages in cool blood in a breach of the peace, by aſſaulting another, inſtead of endeavouring to aſſuage the diſpute, is bound firſt to ſatisfy himſelf of the juſtice of the cauſe he eſpouſes at his peril. And further, in the caſe of a ſudden affray, the conſtable is bound to give a general notice to all concerned in caſes where notice is not preſumed by law, and therefore ſome evidence is neceſſary of the notice having reached the party charged: whereas in the caſe

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Ante, f. 58.

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caſe of an arreſt, it is only neceſſary that the party himſelf who is the object of the arreſt ſhould have notice; becauſe none other but himſelf is immediately concerned: and the officer is not bound to give notice to every perſon who may think proper officiouſly to interfere in oppoſition to him.

§ 83. *Notice to one ignorantly but bona fide interfering to preſerve the peace againſt an officer.*

But if a ſtranger ſeeing two perſons engaged, one of whom being a bailiff was attacking the other with a ſword, which other was reſiſting an arreſt by ſuch bailiff; and the ſtranger, *not knowing the bailiff, but intending to preſerve the peace, and prevent miſchief*, interfere between them and defend the party attacked, and in ſo doing happen to kill the bailiff; this may poſſibly fall under a different conſideration: and in the caſe of one Andrews under the like circumſtances, it was holden not to be murder. This caſe however is reported very differently by Kelyng, who ſays, that Andrews was acquitted for want of ſufficient evidence of the fact of abetting to the death: and that it was agreed by all the Court, that if a man be arreſted, and he and his company endeavour a reſcue; and while they are fighting, one who knows nothing of the arreſt, coming by the way, goes in aid of the perſon arreſted and draws his ſword; there if any of the bailiffs be killed, the perſon who joined in aid againſt them, though he did not know of the arreſt, yet is guilty of murder: *for*, ſays he, *a man muſt take heed how he joineth in any unlawful act, as fighting is;* for if he doth, he is guilty of all that follows (*a*). This reaſoning however ſeems more applicable to the caſe where a ſtranger interferes *not with intent to prevent miſchief, or to keep the peace* under the miſtaken belief of its being violated, which ſeems to be the caſe as reported by Sidderfin, but, as in the caſe commonly put, for the expreſs purpoſe of aiding one of the parties againſt the other; in which caſe there can be no doubt he muſt abide the conſequences at his peril. And there is the leſs reaſon for extending the law further; becauſe as it is the duty of every private man interfering to preſerve the peace to give

R. v. Sir C. Standlie and Andrews, Sid. 359. MS. Burnet, 56. accord. Kel. 86.

Ante, f. 63.

(*a*) 1 Keble, 584, reporting the ſame caſe very ſhortly ſays, It was adjudged that if any caſually aſſiſt againſt the law, and kill the bailiff, it is murder; *eſpecially if he knew the cauſe.*

expreſs notice of his intention, the bailiff has an opportunity of correcting his miſtake. Ch. V. § 83. *Notice of the officer.*

§ 84.

What has been before obſerved reſpecting notice holds in all caſes of arreſts upon proceſs. The party muſt have ſome notification of the officer's buſineſs, or the killing of him will not be murder. If he be a known ſworn officer, the law in the inſtances above mentioned will imply notice: if he be a ſpecial bailiff named in the proceſs, he muſt declare his buſineſs and authority, as by uſing words of arreſt or the like: and if ſuch declaration be true and the proceſs legal, and afterwards he be killed, it is murder: for after that declaration the party killing acted at his peril. But if the officer declare his buſineſs, it is not neceſſary he ſhould produce the warrant itſelf where it is not demanded. It is alſo ſaid, that if a bailiff or conſtable be ſworn and commonly known to be ſuch, and act within his own precinct, he need not ſhew his warrant to the party, though he demand a ſight of it, but the officer ought to tell him the ſubſtance of it: but that all others, or theſe, if acting out of their precincts, ought to ſhew it if demanded. If this be underſtood merely of the warrant conſtituting him bailiff or conſtable, it may be true under the circumſtances before noticed: but with reſpect to the writ or proceſs itſelf againſt the party, there is no difference between the public or private bailiff; for in either caſe, if the party ſubmit to the arreſt and demand it, he is bound to ſhew at whoſe ſuit, for what cauſe, out of what court the proceſs iſſues, and when and where returnable. In no caſe however is he required to part with the warrant out of his own poſſeſſion; for that is his juſtification.

Notice on proceſs. 1 MS.Sum. 169. ante ſ. 81.

Foſt. 311. 1 Hale, 461. Mackally's caſe, 9 Co. 68, 9.

1 Hale, 458. 2 Hawk. ch. 13. ſ. 28.

Ante, ſ. 81.

1 Hale, 458. n. 6 Co. 54. 9 Co. 69.

§ 85.

But it was ruled in Mackalley's caſe, that if the party know the officer and his buſineſs, it is not neceſſary to give expreſs notice thereof. And this extends as well to a ſpecial bailiff as to a known officer. As where Pew ſaid to a bailiff who came to arreſt him, "*Stand off, I know you well enough, come at your peril.*" And upon the bailiff's taking hold of him, Pew killed him; which was holden murder.

Where officer's buſineſs known, notice unneceſſary. Mackalley's caſe, 9 Co 69. 1 Hale, 458. 461. Pew's caſe, Cro. Car. 183. Kel. 67.

4. *That*

Ch. V. § 86. *Arreſt to be duly made.*

4. *That the Proceſs be executed or Arreſt made duly and according to Law.*

§ 86. *Arreſt to be duly made.*

If the warrant be directed to ſeveral, any of them may execute it. And in no caſe of arreſt is a conſtable bound to carry a priſoner before a particular magiſtrate deſired by the priſoner himſelf, but he may follow his own diſcretion; unleſs the warrant be ſpecial, and direct otherwiſe.

2 Hale, 459. 2 MS. Sum. 92. 5 Co. 59.

2 MS. Sum. 170. Foſt. 319.

If the officer in executing his office exceed his authority, the law gives him no protection in that exceſs. And it not only behoves the miniſters of juſtice and other public officers, but likewiſe private perſons endeavouring to arreſt or impriſon in the ſeveral caſes already treated of, to be very careful that they do not miſbehave themſelves in the diſcharge of their duty; for if they do they may forfeit this ſpecial protection. And therefore Mr. Juſtice Foſter thinks that the killing of Mr. Luttrel in the manner reported by Strange would clearly have been murder in the officers who committed that fact. The facts are there ſtated to be, that Luttrel, being arreſted for a ſmall debt, prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order as Luttrel pretended to have the debt and coſts paid. Words aroſe at the lodgings about civility-money, which L. refuſed to give, and went up ſtairs pretending to fetch money for the payment of the debt and coſts, leaving the officer below. He ſoon returned with a brace of loaded piſtols in his boſom, which at the importunity of his ſervant he laid down on the table, ſaying, *he did not intend to hurt the officers, but he would not be ill uſed.* The officer who had been ſent for the attorney's bill ſoon came to the lodgings; and words of anger ariſing, L. ſtruck one of the officers on the face with a walking cane, and drew a little blood; whereupon both of them fell upon him; *one ſtabbed him in nine places; he all the while on the ground begging for mercy, and unable to reſiſt them: and one of them fired one of the piſtols at him while on the ground, and gave him his death's wound.* This is reported to have been manſlaughter, by reaſon of the firſt aſſault with the cane. On this ſtate of the facts, the learned Judge is of opinion that the revenge taken was out of all proportion to the

Foſt. 292. Rex v. Tranter, and Reaſon, 2 Stra. 499. ante, § 21.

the offence, and indicated a diabolical fury. But he rectifies the report by the addition of several material circumstances mentioned in the State Trials. 1. That L. had a sword by his side, which after the affray was found drawn and broken. 2. When he laid his pistols on the table he declared that he had brought them down, *because he would not be forced out of his lodgings.* 3. He threatened the officers several times. 4. One of the officers was wounded in the hand with a pistol shot, both the pistols having been discharged in the affray, and also slightly in the wrist with some sharp-pointed weapon; and the other had a similar wound in the hand. 5. The evidence was only, that while on the ground L. held up his hands *as if* begging for mercy. Upon this the chief justice directed the jury, that if they believed that L. endeavoured to rescue himself, which he seemed to think, and very probably was the case, it would be justifiable homicide in the officers. However, as L. gave the first blow accompanied with menaces to the officers, and considering the circumstance of his producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done if the debt had not been paid or bail given, he declared it could be no more than manslaughter.

Ch. V. § 85. *Arrest to be duly made.*

6 St. Tr. 195.

§ 87. *Breaking doors.*

The question which most frequently occurs under the head of which I am now treating is, in what cases doors may be broken open in order to make an arrest?

Privilege confined to civil suits.

1 MS Sum. 171. Fost. 319. 2 Hawk ch. 14. Cooke's case, Cro Car. 537, 8.

In civil suits the officer cannot justify the breaking open an outward door or window to execute the process: if he do he is a trespasser, and consequently cannot be deemed acting in discharge of his duty. In such case therefore, if the occupier of the house resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family. And it is not murder in this case, says Lord Hale, because it is unlawful in the officer to break the house to arrest. 2dly, It is manslaughter, because he knew him to be a bailiff. But 3dly, had he not known him to be a bailiff, or one who came on that business, it had been no felony, because done in his house. This last instance, which is set in opposition

1 Hale, 458.

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to the ſecond, muſt be underſtood to include at leaſt a reaſonable ground of ſuſpicion that the party broke the houſe with a felonious intent; and that the party did not know, as in the ſecond inſtance, nor had reaſon to believe that it was merely as a treſpaſſer with a different intent.

No privilege in criminal caſes. 1 MS. Sum. 171, 2. Foſt. 320. 1 Hale, 459.

This privilege extends no further than as againſt arreſts upon proceſs in civil ſuits. For where a felony has been committed, or dangerous wound given, or even where a miniſter of juſtice comes armed with proceſs founded on a breach of the peace, the party's own houſe is no ſanctuary for him, but the doors may be forced after the notification, demand, and refuſal aftermentioned.

Foſt. 324.

1 MS. Sum. 172. Foſt. 321. 2 Hawk. ch. 14. ſ. 7. *Vide* Samuel v. Payne, Ante, f. 69.

But though a felony have been actually committed, yet a bare ſuſpicion of guilt againſt the party will not warrant a proceeding to this extremity, unleſs the officer be armed with a magiſtrate's warrant grounded on ſuch ſuſpicion. It will at leaſt be at the peril of proving that the party ſo taken on ſuſpicion was guilty.

2 Hale, 92.

But according to Lord Hale, if there be a charge of felony laid before the conſtable, and reaſonable ground of ſuſpicion thereon; or if there be an affray in an houſe, whereby

2 Hale, 95.

there is likely to be bloodſhed or diſorder; or any unwarrantable diſturbance at any unſeaſonable time of night, eſpecially in alehouſes, or the like places of public reſort which are under the peculiar ſuperintendance of the police; the conſtable or his watch may break open doors to ſuppreſs

2 Hawk. ch. 14. ſ. 8.

the diſorder. And Hawkins, who agrees herewith, adds further, that the conſtable may do the like when an affray has been made within his view; and on his immediate purſuit of the affrayers to apprehend them, they fly to an houſe into which he is not ſuffered to enter.

3 Jac. 1. c. 4. ſ. 1. *Poſſeſſio recuſants.* *Forcible entry.* 2 Hawk. ch. 14. ſ. 4. 6. *Capias utlag.* or *capias pro fine.* *Hab. fac. poſſ.* 5 Co. 93. b. 2 Hawk. ch. 14. ſ. 5. *Warrant of juſtice.*

The like force may be uſed with the like precautions by ſtat. 3 & 4 *Jac.* 1. for the taking of a popiſh recuſant ſtanding excommunicated for ſuch recuſancy: Or where a forcible entry or detainer is either found by inquiſition before juſtices of peace, or appears on their own view: Or upon a capias utlagatum, or capias pro fine, in any action whatever: Or to execute an habere facias poſſeſſionem: Or on the warrant of a juſtice of peace for levying a penalty on a conviction grounded on any ſtatute authorizing the ſame. But in theſe caſes it is required

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required by ſtat. 27 G. 2. c. 20. that the officer executing ſuch warrant ſhall, if required, ſhew the ſame to the perſon whoſe goods and chattels are diſtrained, and ſhall ſuffer a copy thereof to be taken.

27 G. 2. c. 20.

Privilege confined to outward doors. 1 MS. Sum. 171. Foſt 319. 1 Hale, 458.

Further, the above-mentioned rule, though founded in a laudable jealouſy of private liberty, yet encroaching in ſome degree on public juſtice, is not one of thoſe which will admit of any extenſion. It is therefore confined even in civil caſes to *outward* doors and windows only, ſuch as are intended for the ſecurity of the houſe againſt perſons from *without* endeavouring to break in. For if the officer find the outward door open, or it be opened to him from within and he enter that way, he may then break open any *inward* door, if he find that neceſſary to execute his proceſs.

Lee v. Ganſel, Cowp. 1.

In the caſe of Lee v. Ganſel, the defendant had for ſeveral years rented a firſt and ſecond floor in the houſe of A. as tenant from year to year, and A. occupied the ground floor. The outer door being opened the officer entered, and after notification of his buſineſs, demand, and refuſal, broke open the door of Ganſel's chamber: and it was ruled that he was juſtified in ſo doing.

Baker's caſe, at Serjeant's Inn, Mich. Term 1775, before all the judges, Crown Caſ. Reſ. MS. & Leach. 106. laſt edit. 131. S. C.

In Baker's caſe, (where indeed there was proof of a previous reſolution in the priſoner to reſiſt the officer, whom he afterwards killed in attempting to attach (*a*) his goods in his dwelling-houſe in order to compel an appearance in the county court,) the outer door, through which the deceaſed paſſed was divided into two parts, the lower hatch of which was cloſed, and the upper part open. The officer put his arm over the hatch to open it, on which a ſtruggle enſued between him and a friend of the priſoner, in the courſe of which, the officer having prevailed, the priſoner ſhot at and killed him: and held murder.

To the occupier and his family.

Foſt. 320. 1 MS Sum. 170, 1. 5 Co. 93.

Again, this privilege of a man's caſtle from any outward breach extends only to thoſe caſes where *the occupier or any of his family*, who have their domicile, their ordinary reſidence there, are the objects of the arreſt: for if a ſtranger, whoſe ordinary reſidence is elſewhere, upon purſuit take refuge in the houſe of another, ſuch houſe is no caſtle of *his*, and therefore he cannot claim the benefit of ſanctuary

(*a*) The objection principally turned on the legality of the attachment, which was ſigned by the county clerk (whoſe proper duty it was) in his own cauſe; but this being a mere miniſterial act was holden to be immaterial.

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in it. It muſt be obſerved, however, that in all caſes where the doors of ſtrangers are broken open upon ſuppoſition of the perſon ſought being there, it muſt be at the peril of finding him there: unleſs as it ſeems where the parties act under a magiſtrate's warrant.

2 Hale, 103. *Vide* Foſt. 321.

Confined to arreſts in the firſt inſtance. Foſt. 320. 1 Hale, 459. Salk. 79. 2 Hawk. ch. 14. ſ. 9.

This privilege is alſo confined to arreſts in the *firſt* inſtance. For if a man who is legally arreſted, (and laying hold of the priſoner and pronouncing words of arreſt is an actual arreſt,) eſcape from the officer, and take ſhelter, though in his own houſe, the officer may upon freſh purſuit break open the door in order to retake him, having firſt given due notice of his buſineſs, and demanded admiſſion, and been refuſed. If it be not, however, upon freſh purſuit, it ſeems that the officer ſhould have a warrant from a magiſtrate.

John Stevenſon's caſe, 10 St. Tr. 462.

Neither would the officer be warranted in breaking open doors to retake his priſoner if the firſt arreſt had been illegal; as by the warrant having been filled up after it had been ſealed (*a*). And therefore in ſuch caſe after the officer had made an arreſt on civil proceſs, being obliged to retire by the party's ſnapping a piſtol at him ſeveral times, and having returned again with aſſiſtants who attempted to force the door, on which the man within ſhot one of them; it was ruled to be only manſlaughter.

Previous notification and demand of entrance. Foſt. 320. 1 MS. Sum. 171. 2 Hawk. ch. 14. ſ. 1.

Laſtly, it is to be obſerved, that not only in this, but in every caſe, whether criminal or civil, where doors may be broken open in order to make an arreſt, there muſt be a previous notification of the buſineſs and a demand to enter on the one hand, and a refuſal on the other, before the parties proceed to that extremity. And in all caſes if the officer, or his aſſiſtants, having entered a houſe in the execution of his duty, be locked in, they may juſtify breaking open the doors to regain their liberty.

2 Hawk. ch. 14. ſ. 11.

§ 88. *Time for making arreſt.* 1 Hale, 457. 1 Hawk. ch. 31. ſ. 56. 9 Co. 66. a. 29 Car. 2. c. 7.

In reſpect to the time for executing proceſs, it may be done at night as well as by day; and therefore killing the bailiff or other officer on pretence of his coming at an unſeaſonable hour would be murder. But ſince the ſtat. 29 Car. 2. c. 7. ſ. 6. all proceſs, warrants, &c. ſerved or executed on

(*a*) If the warrant be filled up by the magiſtrate before he iſſues it, though ſigned before, it is regular, and killing the officer in endeavouring to arreſt the party is murder. Cited by Lord Kenyon in R. v. The Inhabitants of Winwick, 8 Term Rep. 455. as a caſe determined ſome years ago.

a Sun-

a Sunday are void, except in caſes of treaſon, felony, or breach of the peace: And therefore an arreſt on any other account made on that day is the ſame as if done without any authority at all. Though it may ſerve to explain the occaſion. Ch. V. § 88. *Time of arreſt.*

§ 89. *How far a third perſon interfering to prevent arreſt, and killing the officer, can avail himſelf of the illegality of ſuch arreſt.*

It remains to be conſidered, *how far any defect in the frame of the proceſs, or any other illegality in the arreſt, may be urged in defence of a third perſon who interferes to prevent it, and kills the officer in ſo doing.*

The queſtion in a legal form is reduceable to this, How far the mere view of a perſon under arreſt, or about to be arreſted, ſuppoſing it to be illegal, is *of itſelf* ſuch a provocation to a by-ſtander, as will extenuate his guilt in killing the officer, in order to ſet the party free in the one inſtance, or prevent the arreſt in the other? The affirmative part of this queſtion was maintained to the full extent of it by ſeven judges againſt five, in the caſe of Tooley and others. There one Bray, who was a conſtable of St. Margaret's pariſh in Weſtminſter, came into the pariſh of St. Paul Covent Garden, where he was no conſtable and conſequently had no authority; and there took up one Ann Dekins, under ſuſpicion of being a diſorderly perſon, but who the ſpecial verdict found had not miſbehaved herſelf, and againſt whom Bray had no warrant. While he had her in cuſtody they were met by the priſoners, who were all ſtrangers to Dekins, and who drew their ſwords and aſſaulted Bray to reſcue her from his cuſtody: but upon his ſhewing them his conſtable's ſtaff, and declaring he was about the queen's buſineſs and intended them no harm, they put up their ſwords, and he carried the woman to the round-houſe in Covent Garden. Soon after the priſoners drew their ſwords again, and aſſaulted Bray on account of the impriſonment of the woman, and in order to get her diſcharged; whereupon Bray called Dent to his aſſiſtance to keep the woman in cuſtody, and defend himſelf from the violence of the priſoners; when one of the priſoners before any ſtroke received gave Dent a mortal wound. All the judges except one agreed that Bray acted without any authority; but that one thought that ſhewing his ſtaff was ſufficient; and that with reſpect

Rex v. Tooley and others, 2 Ld. Ray. 1296. poſt. 324. 1 Hawk. ch. 31. ſ. 54. *Vide* Foſt. 312.

Ch. V. § 89. *How far illegality of arreſt an excuſe for third perſons.*

to the priſoners he was to be conſidered as conſtable de facto. But the main point on which they differed was, whether the illegal impriſonment of a ſtranger were under theſe circumſtances a ſufficient provocation to by-ſtanders, or, as Lord Holt expreſſed himſelf, a provocation to all the ſubjects of England. The five judges who held the caſe to be murder thought that it would have been a ſufficient provocation to a relation or friend, but not to a ſtranger. The other ſeven thought there was no ground for making ſuch a diſtinction, and that it was a provocation to all whether ſtrangers or otherwiſe, ſo as to reduce the offence to manſlaughter; it being a ſudden action, without any precedent malice, or apparent deſign of doing hurt; but only to prevent the impriſonment of the woman, and to reſcue one who was unlawfully reſtrained of her liberty. But they admitted, that all perſons interfering in the caſe of an arreſt by officers of juſtice did it at their peril in caſe the arreſt ſhould be lawful. The opinion however maintained by the ſeven judges in the above caſe has been very ably combated by Mr. Juſtice Foſter, who holds that the kind of provocation which extenuates homicide into manſlaughter muſt be a ſudden provocation immediately felt by the party himſelf at the time of the fact, and not a reſentment ſuggeſted by reflection or political reaſonings for an injury done to a ſtranger, and the conſequence of that injury to the public in general. The caſe, he ſays, was in truth no more than this: the priſoners ſaw a woman, a perfect ſtranger to them, led to the round-houſe, under a charge of a criminal nature; and this afterwards appeared to have been an illegal arreſt; but which was *not known to them at the time*. Upon which they had at the firſt meeting with the conſtable drawn their ſwords upon him, unarmed as he was againſt ſuch weapons, but ſoon put them up again, appearing to be pacified; and cool reflection ſeemed in ſome meaſure to have taken place. At the ſecond meeting, which was after the woman was in the round-houſe, the deceaſed received his death's wound before a blow was given, or for aught appeared offered on the part of him or his party. This he conſiders as grounded rather upon reſentment or a principle of revenge for what had paſſed before, than upon any hope or endeavour to aſſiſt the woman. And without entering

Vide Rex v. Keate, Com. Rep. 13. ad idem.

Ante, f. 58.

Foſt. 312.

entering into the merits of Hopkins Hugget's caſe, (which he ſeems to doubt,) he diſtinguiſhes this of Tooley's, as well from that, as from the caſe of Sir Henry Ferrer's ſervant, both of which were mainly relied on in Tooley's caſe: for in both there was an affray, wherein the blood might be heated before the mortal wound was given. In the latter, after Sir Henry had ſubmitted to the arreſt, his ſervant *quarrelled* with the officer, and fought and killed him. According to the report the reſcue was a mere pretence; and therefore the caſe was clearly no more than manſlaughter; being homicide upon a ſudden affray; without entering into the queſtion of the illegality of the arreſt. And the ſame might be ſaid of Hopkins Hugget's caſe as ſtated by Lord Hale. It was a ſudden quarrel and affray, and a combat between him and an aſſiſtant of the preſs-maſter, upon ſome rudeneſs offered on the part of the aſſiſtant. Though Kelyng reports the caſe to have turned on the illegality of the impreſs, being without any proper warrant, and the provocation ſuch an act of oppreſſion may be preſumed to give to every man, whether friend or ſtranger, to endeavour a reſcue.

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Cro. Car. 371.

1 Hale, 465. poſt. 328.

Kel. 59.

Mr. Juſtice Foſter adds to his obſervations on theſe caſes, that he is firmly perſuaded, that on ſuch occaſions as theſe a general ſubmiſſion to the known badges of authority, exacted from all perſons ſtrangers to the party ſuppoſed to be injured or his cauſe, would greatly conduce to the ſtability of government in the fate of which all private rights are involved. From whence it ſeems, that with reſpect to mere ſtrangers at leaſt he rather inclined to favour the opinion of the ſingle judge, who held in Tooley's caſe, that Bray's acting as conſtable de facto was ſufficient to conſtitute the crime of murder as againſt the priſoners. But the difficulty lies in making out the fact of Bray's having acted as conſtable de facto, as was obſerved by Lord Holt in anſwering that argument. For though it be not neceſſary, according to Gordon's caſe, to prove the appointment and ſwearing in of ſuch an officer, yet evidence of his being generally received by the pariſh, and known as ſuch, ſeems to be neceſſary before he can be conſidered even as conſtable de facto. Whereas in Tooley's caſe another perſon was actually inveſted with the office.

Foſt. 317.

Ante, p. 315.

Ch. V. § 89. *How far illegality of arreſt an excuſe for third perſons.*

It may be worthy of conſideration whether the illegality of an arreſt does not place the officer attempting it exactly on the ſame foot as any other wrong-doer: and whether in the caſe of interference by a ſtranger or any other perſon, the queſtion of provocation ought not to be governed by the ſame rules as regulate ordinary caſes of the like ſort. The four judges who differed in Hugget's caſe, though they do not in terms adopt this concluſion, yet argue from the ſame premiſes. The circumſtances of that caſe, as ſtated more at large by Kelyng, were theſe: Berry and two others preſſed a man, without any warrant for ſo doing; to which the man quietly ſubmitted, and went along with them. The priſoner with three others ſeeing them inſtantly purſued them, and required to ſee their warrant: on which Berry ſhewed them a paper, which the priſoner and his aſſociates ſaid was no warrant; *and immediately drew their ſwords to reſcue the impreſſed man*, and *thruſt* at Berry. Whereupon Berry and his two companions drew their ſwords, and a fight enſued, in which Hugget killed Berry. Now on that ſtatement of the caſe, unleſs an illegal arreſt be ſtill ſuppoſed to be a provocation to all the people of England, as was ſaid in Tooley's caſe, Hugget upon the principle already ſtated was undoubtedly guilty of the murder. For, as was urged by thoſe four judges, if A. aſſault B. without any provocation, and draw his ſword and paſs at him; and then B. to defend himſelf draw his ſword, and they fight together; if A. kill B., it is murder; and B.'s drawing his ſword to defend himſelf ſhall not leſſen the other's offence. And they were alſo of opinion, *that nothing but an open affray or ſtriving can be a provocation to any perſon to meddle with an injury done to another*, ſo as to leſſen the offence to manſlaughter, if in that meddling he kill a man; and not even that, as hath been ſhewn, in the caſe of a lawful arreſt. But, ſay the ſame judges, where people are at peace, there if another man, upon ſuſpicion that an injury is done to one of them, will aſſault and kill him whom he ſuppoſes did the injury, this is murder. And they held, that the caſe in 12 Rep. 87, where two who were playing at bowls quarrelled, and a third perſon in revenge of his friend ſtruck the other with a bowl and killed him; which was ruled to be only manſlaughter;

Ante, f. 20, &c.

Hugget's caſe, Kel. 59. Ante, 327.

Vide 1 Hale, 465. Ante, f. 58.

Ante, f. 63. 83, 84.

ter; muſt be intended to mean that the two men who fell out were actually *fighting together* at the time; for if words only had paſſed between them, it would have been murder; to which all the other judges agreed. And the four held Hugget's caſe to be much ſtronger than that, *becauſe the impreſſed party himſelf was quiet and made no reſiſtance, and becauſe they who meddled were no friends or acquaintance of his*, but *mere ſtrangers*, and did not ſo much as deſire thoſe who had him in cuſtody to let him go, *but preſently without more drew their ſwords and ran at them* (*a*). And they thought it of dangerous conſequence to give any encouragement to private men to take upon themſelves to be the aſſertors of other men's liberties, and to become patrons to reſcue them by force from wrong, eſpecially in a nation where there are good laws for the puniſhment of all ſuch injuries: and one great end of law is to right men by peaceable means, and to diſcountenance all endeavours to right themſelves, much leſs other men, by force.

Ch. V. § 89. *How far illegality of arreſt an excuſe for third perſons.*

Upon the ſame reaſoning, on the want of ſufficient provocation, Tooley's caſe ſtands (ſays Mr. Juſtice Foſter on another occaſion) on no better grounds than the opinions of ſeven learned judges againſt five: for there the mortal blow was given before any ſtroke given or offered by the other party, or any other legal provocation to them, unleſs the illegality of the woman's impriſonment, as it eventually appeared, were a provocation to every ſubject (*b*).

Ante, 325. Foſt. 138.

(*a*) Huggett's caſe is ſtated very differently by Lord Hale; according to whom it was no more than this: a preſſ-maſter, with the aſſiſtance of C. ſeized B. for a ſoldier; D. finding fault with the rudeneſs of C. *there grew a quarrel between them*, and D. killed C.

1 Hale, 465. *Vide* Foſt. 314.

(*b*) *Vide* Mary Adey's caſe, O. B. 1779, where the ſame kind of queſtion aroſe. The priſoner, who cohabited with one Farnello, killed an aſſiſtant of the conſtable who came to take him up as as a vagrant under the 19 G. 2. c. 10.; he in truth not being an object of the act, but not having made any reſiſtance himſelf to the arreſt. Leach, 189. ſays, that the priſoner, whoſe caſe was argued upon a ſpecial verdict before all the judges, lay 18 months in gaol, and was then diſcharged. Upon inquiry, however, it appears, that pending the conſideration of the caſe by the judges ſhe eſcaped during the riots in 1780, and was never re-taken. MS. Buller J. And vide the note to the laſt edit. of Leach, 1 vol. 245. 253.

Ch. V. § 90. *Touching ſafe cuſtody after arreſt.*

II. *Touching the ſafe Cuſtody of Perſons arreſted and in Confinement.*

§ 90. Ante, f. 65.

This is either with reſpect to the officers making the arreſt, or with reſpect to the gaoler to whoſe cuſtody the priſoners are afterwards conſigned.

Safe cuſtody by officer arreſting.

Ante, f. 68. 1 Hale, 489. Pult. de pace, 221.

Ante, f. 67. Sum. 36, 37. 3 Inſt. 221.

Ante, f. 63. 67. 70, 71. 74.

1 Hale, 481. Ante, f. 70. 74.

Ante, f. 87.

1. The firſt ſubject of inquiry is already exhauſted; it having been before obſerved, that after an arreſt once legally made, (and laying hold of a priſoner and pronouncing words of arreſt is an actual arreſt,) if the party eſcape, or with his conſent be reſcued from the officer, the latter may lawfully kill him, in the caſe of an arreſt for felony actually committed, or whether committed by him or not, if he had been arreſted upon a proper warrant, or hue and cry had been raiſed againſt him by name, or he had ſtood indicted for felony: but if in any of theſe caſes the officer might have otherwiſe taken him, it will be at leaſt manſlaughter. And it has alſo been ſhewn, that whether in civil or criminal caſes the officer may kill the party who is the object of the arreſt, or any other perſon actually reſiſting him in his endeavours for that purpoſe, without being obliged firſt to retreat. But that in caſes of arreſt for miſdemeanors, or in civil ſuits, it is unlawful to kill a priſoner who eſcapes from the arreſt by bare flight, without any actual reſiſtance; and conſequently the caſe will be either murder or manſlaughter according to the circumſtances. Again, it has been ſhewn that in all caſes after an arreſt once made, the officer may on freſh ſuit break open doors to retake his priſoner if he eſcape or be reſcued.

§ 91. *By Gaolers.* Foſt. 321. 1 Hale, 481.

2. Gaolers and their officers are under the ſame ſpecial protection as other miniſters of juſtice: and therefore if in the neceſſary diſcharge of their duty they meet with reſiſtance, whether from the priſoners themſelves in civil or criminal ſuits, or from others on behalf of ſuch priſoners, they are not obliged to retreat as far as they can with ſafety, but may freely and without retreating repel force with force. And if the party ſo reſiſting happen to be killed, this on the part of the gaoler or his officer, or any perſon coming in aid of him, will be juſtifiable homicide. On the other

other hand, if any of theſe ſhould fall in the conflict, this will amount to wilful murder in all perſons joining in ſuch reſiſtance. Ch. V. § 91. *Touching ſafe cuſtody by gaolers.*

But an aſſault upon a gaoler, which would warrant him (apart from any perſonal danger) in killing a priſoner, muſt it ſhould ſeem be ſuch from whence he might reaſonably apprehend that an eſcape was intended, which he could not otherwiſe prevent. And Hawkins ſeems to underſtand this matter in the ſame manner when he ſays, that if a criminal, *endeavouring to break the gaol*, aſſault the gaoler, the latter may lawfully kill him in the affray. 1 MS. Sum. 145. ſemb. Pult. 120, 1. 1 Hawk. c. 28. ſ. 13.

§ 92. *Dureſs by gaolers.*

The law however watches with a jealous eye over the conduct of theſe officers; and therefore if a priſoner under their care die, whether by diſeaſe or accident, the coroner, upon notice of ſuch death, (which notice the gaoler is obliged to give in due time,) ought to reſort to the gaol, and there, upon view of the body, make inquiſition into the cauſe of the death. And if it were owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of his, or in the language of the law to dureſs of impriſonment, it will be murder *in the perſon guilty of ſuch dureſs*. For though in civil ſuits the principal may in ſome inſtances be anſwerable for the fault of his deputy, yet in criminal caſes each man muſt anſwer for his own acts or defaults. If a gaoler, knowing that a priſoner infected with the ſmall-pox lodged in a certain room in the priſon, confined another priſoner againſt his will in the ſame room, in conſequence of which the latter, who had not had the diſtemper, *of which the gaoler had notice*, caught it and died of it; this, being done from a deliberate malignant motive, would clearly be murder in the gaoler. Foſt. 321. 1 Hale, 466. 3 Inſt. 52. Poſt. ch. 6. ſ. 2. Caſtell widow v. Bambridge and Corbett, 2 Stra. 856. 9 St. Tr. 177. 181. Foſt. 322.

On an indictment for the murder of one Arne, a priſoner in the Fleet, the jury found ſpecially, that the defendant Huggins was by letters patent conſtituted warden of the Fleet, with power to execute the office by deputy; that he appointed Gibbon his deputy, who acted as ſuch; that Barnes was Gibbon's ſervant, and was to take care of the priſoners, and particularly of Arne; but that he put him into a new-built room which was over the common ſewer, Rex v. Huggins and Barnes, 2 Stra. 882; Foſt. 322. *Vide* Rex v. William Stevenſon, O. B Sept. 1784, Seſſ. Papers 1177.

the

Ch. V. § 92. *Touching safe cuſtody by gaolers.*

the walls of which were damp and unwholeſome, and kept him without fire, chamberpot, or other neceſſary convenience for forty-four days. That Barnes knew the unwholſome ſituation of the room; and that for fifteen days at leaſt before the death of Arne Huggins knew the condition of the room, he having been that once preſent at the priſon, and ſeen Arne under ſuch dureſs of impriſonment, and turned away; at which time Barnes ſhut the door of the room, in which Arne continued till he died. That by dureſs of the impriſonment Arne had ſickened and died. That during the time Gibbon was deputy Huggins ſometimes acted as warden. The Court were clearly of opinion upon theſe facts that Barnes was guilty of murder. They were deliberate acts of cruelty, and enormous violations of the truſt repoſed by the law in its miniſters of juſtice. But they alſo thought that Huggins was not guilty. It could not be inferred from the bare ſeeing the deceaſed once during his confinement that Huggins knew his ſituation was occaſioned by the improper treatment, or that he conſented to the continuance of it. They ſaid it was material that the ſpecies of dureſs by which the deceaſed came to his death could not be known by a bare looking in upon him. Huggins could not know the circumſtances under which he was placed in the room againſt his conſent, or the length of his confinement, or how long he had been without the decent neceſſaries of life: and it was likewiſe material that no application was made to him, which perhaps might have altered the caſe. Beſides, the verdict finds that Barnes was the ſervant of Gibbon, and Gibbon had the actual management of the priſon; and they ſeemed to think that the accidental preſence of the principal would not amount to a revocation of the deputy's authority.

§ 93. *Execution.*

III. *Touching the Execution of Criminals in Purſuance of the Judgment.*

1 Hale, 497.

The deliberate uncompelled extrajudicial killing of any perſon, though attainted of treaſon or felony, or in a præmunire, is murder; unleſs done upon due proceſs and according

according to law, in which caſe the act is juſtifiable from neceſſity. Under this head I ſhall take the conſideration of the matter higher up than the mere act of execution, and examine, 1. How far the witneſſes on whoſe evidence the verdict and judgment are founded are implicated in the rectitude of the conſequent execution. 2. How far the judge who pronounces or the officers who execute the judgment are anſwerable for the legality of it. 3. To what extent the execution muſt conform to the judgment. 4. That the execution be done by a lawful officer.

Ch. V. § 93. *In execution of judgment.*

§ 94. *As to witneſſes.*

1. It has been much doubted whether a perſon wilfully giving falſe teſtimony againſt another in order to accompliſh his death can be indicted of murder, if the innocent party be convicted thereon and ſuffer death by the judgment of the law. The only inſtance of a proſecution of this ſort in modern times was in the caſe of Macdaniel, Berry, and Jones, who were indicted for murder, upon a conſpiracy of this nature againſt one Kidden, who was convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones. They were all convicted upon this indictment, in which the ſpecial matter was ſet forth; but judgment was reſpited in order that the point of law might be more fully conſidered upon a motion in arreſt of judgment. But the Attorney-General declining to argue the point, the priſoners were diſcharged of that indictment. Mr. Juſtice Foſter intimates a ſtrong opinion againſt the validity of ſuch an indictment, chiefly as it ſeems on the ground of its diſuſe for many ages paſt; though he admits that there are ſtrong paſſages in our ancient writers which greatly countenance ſuch a proſecution. And we have the authority of Mr. Juſtice Blackſtone for ſaying, that the Attorney-General, in the caſe of Macdaniel and the others, did not decline arguing the point of law from any apprehenſion that it was not maintainable (*a*), but from other prudential reaſons; and therefore that nothing ſhould be concluded from the waving of that proſecution. What the chief of thoſe

3 Inſt. 48. Foſt. 131. Rex v. Macdaniel Berry and Jones, in 1756. *Vide* 10 St. Tr. 446. Leach, 39. and Barrington on the Statutes, 56.

Vide Mirr. ch. 1. ſ. 9. Brit. c. 52. Brac. lib 3. c. 4. *Vide* 1 Hawk. ch. 31. ſ. 7. 4 Blac. Com. 196. 3 Inſt. 91.

(*a*) The author has heard Lord Mansfield C. J. make the ſame obſervation; and ſay, that the opinions of ſeveral of the judges at that time, and his own, were ſtrongly in ſupport of the indictment.

prudential

Ch. V. § 94. *As to Witneſſes.*

prudential reaſons was he alludes to in the ſame paſſage, namely, to avoid the danger of deterring witneſſes from giving evidence upon capital proſecutions if it muſt be at the peril of their own lives. With reſpect to the offence in foro conſcientiæ, it is without doubt as aggravated a ſpecies of murder as any that can be conceived.

§ 95. *As to the judge and officer.*

2. As to the reſponſibility of the judge who pronounces, and the officer who executes the ſentence, it does not ſeem to be very accurately defined. Lord Hale ſays, that it is neceſſary, firſt, that he who gives ſentence of death againſt a malefactor be authorized by lawful commiſſion or charter, or by preſcription, to have cognizance of the cauſe. Secondly, That he who executes ſuch ſentence be authorized ſo to do; otherwiſe it will be murder or manſlaughter, or at leaſt a great miſpriſion in the judge who pronounced, and in the officer who executed ſuch ſentence. But where their reſpective authorities are complete, the execution of ſuch ſentence is the cleareſt inſtance of juſtifiable homicide. The magnitude of the offence, where the act becomes ſuch for want of due authority, ſeems to depend upon the degree of colour under which either the judge or officer acted who have acted improperly. If the perſon who pronounced the ſentence had no colour of authority at all, it is undoubtedly murder in him and in the perſon who knowingly executed ſuch a ſentence. But if there be but ſlight colour, and the judge acted bonâ fide and under a belief, though miſtaken, that he had competent juriſdiction, he could not I think be guilty of murder. As if juſtices of peace, whoſe commiſſion extends to try felonies but not treaſons, gave judgment of death on an indictment for treaſon; though this would be erroneous, yet, ſays Lord Hale, they would not be guilty of murder, having ſome colour for proceeding therein; becauſe all treaſon is felony, though it be ſomething more: but tha it would be a great miſpriſion in ſuch juſtices. Yet it is now notorious that their commiſſion does not confer any ſuch authority. If however the juſtices had juriſdiction over the offence, and the proceedings only were erroneous, the juſtices only to whom ſuch error was known, and who notwithſtanding wilfully proceeded, would be guilty of felony, and

2 Hale, 497.
2 Hawk. ch. 28. ſ. 4, 5. ch. 31. ſ. 59.
2 Hale, 497. 500, 1.
4 Blac. Com. 178.
2 Hale 454-497, &c.
Vide Farrington's caſe, T. Jones, 222. 1 rem. P.C. 250. 1 MS. Sum. 138, 9.
2 Hawk. ch. 28. ſ. 6.
2 Hale, 501.

Ch. V. §95. *As to judge and officer.*

and not the officer who executed their ſentence. But where perſons act by virtue of a commiſſion, which if it were ſtrictly regular would give them full authority, but it happens to be defective only in ſome point of form, it ſeems that they are no way criminal. As where a commiſſion is determined by the neglect of the clerk to adjourn, a judgment afterwards would indeed be erroneous, but the judge who inadvertently pronounced as well as the officer who executed the ſentence would be excuſed.

1 Hawk. ch. 31. ſ. 60.
1 Hale, 498.

§ 96. *Execution muſt conform to the ſentence.*

3. The execution muſt not vary from the judgment, otherwiſe, according to Lord Coke and Lord Hale, the officer executing it will be guilty of felony at leaſt, if not of murder. And therefore, ſay they, if the judgment be to be hanged, and the officer behead the party, it is holden murder. But this is not univerſally true. If indeed the officer of his own head and without warrant or colour of authority vary from the judgment, he may be criminal to that degree. But if the officer have a warrant from the crown for beheading a perſon under ſentence of death for felony, and act accordingly, this would not be criminal. For though the king cannot by his prerogative vary the execution ſo as to aggravate the puniſhment beyond the intention of the law, yet he may mitigate the pain or infamy of it. And even without any warrant the common practice in burning female offenders before the act of the 30 Geo. 3. c. 48. was to ſtrangle them at the ſtake before the fire had reached them: but now by that act they are to be hanged as other offenders.

3 Inſt. 52. 211. 1 Hale, 433. 454. 466. 501. 2 Hale, 412. Foſt. 267, 9. 4 Blac. Com. 405. 1 MS. Sum. 142. 4 St. Tr. 129.

§ 97. *Muſt be by proper officer.*

4. The execution muſt be performed by the proper officer or his appointed deputy. And if one without any authority were to take upon him to execute ſentence of death, it would be murder.

1 Hawk. ch. 28. ſ. 9. 2 Hawk. ch. 51. ſ. 6.

1 Hale, 497. Sum. 35. 4 Blac. Com. 178, 9. Dalt. ch. 150.

Ch. V. § 98. *Deſcription of offence.*

VII. *How far all or any of the Circumſtances treated of under the foregoing Heads vary the Degree and Puniſhment of the Offence of Homicide committed againſt Maſters, Huſbands, or eccleſiaſtical Superiors, reſpectively, by their Servants, Wives, or eccleſiaſtical Inferiors.*

§ 98. *Nature of offence.* 25 E. 3. ſt. 5. c. 2. *vide* 1 Ed. 6. c. 12. ſ. 1. 2 Hale, 377. 3 Inſt. 19. Foſt. 106. 323. 326, 7. 1 Hawk. ch. 32. ſ. 6. Sum. 24. 1 Hale, 378. 2 Hale, 184.

The ſtat. 25 E. 3. ſt. 5. c. 2. aſcertained and limited the offence of petit treaſon to the three inſtances above mentioned out of ſeveral others, which were ſo conſidered at common law.

Petit treaſon, which is a ſpecies of felony, is the higheſt degree of murder: it is murder aggravated by circumſtances of a treaſonable kind. And therefore if the fact appear to have happened upon a ſudden falling out, or in the party's neceſſary defence, or under any circumſtances which at common law would reduce the crime below murder, it cannot be petit treaſon, but will fall under the ſame conſiderations as if the party had been indicted of murder. And ſo a pardon of murder, or an exception of murder in a pardon of all felonies generally, includes petit treaſon. It only remains therefore to be conſidered in what inſtances the ſeveral relations above referred to are of force to denominate the killing petit treaſon.

§ 99. *By a ſervant.* 1 Hale, 380. Sum. 23. 1 Hawk. ch. 32. ſ. 2, 3, 4. 4 Blac. Com. 203. 3 Inſt. 20. Keilw. 204. Daliſon, 14. Dalt. ch. 142.

1. A ſervant killing his maſter. Under the term *maſter* is included miſtreſs or his maſter's wife. And if a ſervant kill his maſter after departure from his ſervice, upon malice conceived before, this will be petit treaſon. So if a ſon kill his father or mother, to whom he is bound apprentice, or by whom he is maintained, and to whom he does any neceſſary ſervice, although he receive no wages, yet by reaſon of the ſervice he may be indicted by the deſcription of ſervant within the act.

§ 100. *By a wife.* 3 Inſt 20. 1 Hale, 381. 4 Blac. Com. 203. et vid. authorities ſupra.

2. A wife killing her huſband is petit treaſon; but a huſband killing his wife is only murder; becauſe of the obedience which in relation of law is due from the wife to the huſband.

band. A wife though divorced a menſa et thoro is ſtill within the ſtatute, becauſe the vinculum matrimonii ſubſiſts. But a wife de facto is not ſufficient: and therefore if a man marry a ſecond wife, living the firſt, the ſecond is not within the ſtatute, unleſs under circumſtances ſhe might be conſidered as a ſervant, which however Lord Hale ſeems to doubt. Ch. V. § 100. *By a wife.*

As to what ſhall be deemed ſufficient evidence of marriage in proſecutions of this ſort, it may be collected from the following caſe in addition to the general authorities already in print. *Evidence of marriage.* *Vide* title Polygamy.

Mary Norwood was indicted before Mr. Serjeant Burland for traiterouſly poiſoning and murdering her huſband Joſeph Norwood. It was objected by the priſoner's counſel that there was no proof of actual marriage, and that ſuch proof could only be by producing a copy of the regiſter of ſuch marriage, or by ſome perſon who was preſent at the time. The evidence of marriage was, firſt, cohabitation as man and wife for ſeven years, excepting three months within the laſt two years, when ſhe eloped with another man, but returned and cohabited again with Joſeph Norwood. Secondly, about a year before the murder the priſoner went to a neighbour's and aſked him, whether ſhe had better poiſon her huſband or part from him, for one or other ſhe muſt do. Thirdly, that after the poiſon taken ſhe deſired a ſurgeon to come and ſee *her huſband;* and ſpoke of him to ſeveral others who were about him during his illneſs by the name of *huſband.* Fourthly, the deceaſed after the poiſon taken ſpoke of her by the name of *his wife.* Fifthly, the priſoner's brother who appeared as a witneſs for her, and who ſix years before had lived with her and Joſeph Norwood, ſpoke of knowing them ever ſince they were *married.* Upon this evidence of the marriage the priſoner was convicted; but execution was reſpited to have the opinion of the judges. And on the 24th of April 1765, at Serjeants'-Inn, Lord Mansfield, Lord C. B. Parker, Smythe, Bathurſt, Perrot, and Aſton Js. being all who were preſent, were of opinion that the marriage was ſufficiently proved, and that ſhe ought to be executed. They ſaid, this would be ſufficient evidence for a biſhop to certify a marriage upon a plea of ne unques accouplez, &c. *Mary Norwood's caſe,* Taunton Lent Aſſ. 1765; Serj. Forſter's MS.

Ch. V. § 101. *By a clergyman.*

§ 101. 4 Blac. Com. 203. 1 Hale, 381. 3 Inſt. 20.

3. A clergyman killing his eccleſiaſtical ſuperior to whom he owes obedience is alſo guilty of petit treaſon. A clergyman is underſtood to owe canonical obedience to the biſhop who ordained him, to him in whoſe dioceſe he is beneficed, and alſo to the metropolitan of ſuch ſuffragan or dioceſan biſhop. If he have livings in two dioceſes, the biſhops of both are his immediate ordinaries; for he ſwears obedience to both.

§ 102. *Principals and acceſſaries.* 1 MS. Sum. 118. 1 Hale, 379. 381, 2. 1 Hawk. ch. 32. ſ. 6. 3 Inſt. 20. Fitz. Cromp. Juſt. 19.

There are acceſſaries before and after in petit treaſon, as in caſe of felony; but ſome diſtinctions are to be noted.

If a ſervant kill his maſter by the procurement of the wife who was abſent, it is petit treaſon in the ſervant, and the wife is acceſſary thereto. But if a ſtranger had done it by the procurement of either in their abſence, it would have been murder in the ſtranger, and the wife or ſervant would have been acceſſary to the murder: for where the principal is only a felon the acceſſary cannot be a traitor. But if a ſtranger had done it by the procurement and in the preſence of the wife or ſervant (and their being in the ſame houſe is in law a preſence); it would have been petit treaſon in the wife or ſervant, and murder in the ſtranger: and the ſame if the ſtranger were an acceſſary. And ſo if a ſervant and a ſtranger conſpire to rob the maſter, and the ſervant be preſent when the maſter happens to be killed in the proſecution of the original deſign, the ſervant is guilty of petit treaſon. The ſame if the ſervant or wife, intending to kill a ſtranger, kill the one his maſter, or the other her huſband, by accident. The ſame rule holds throughout, mutatis mutandis, for an inferior clergyman in relation to his ſuperior.

(Fitz. Cromp. Juſt. 20.)

1 Hale, 380. Dalt. ch. 142. ſ. 2, 3. Plowd. 475.

§ 103. *Indictment and verdict.* Foſt. 325. 328. 2 Hale, 378. (*Vide* a caſe in 6 St. Tr. 224. contrà, cited by Mr. Juſtice Foſter, & rejected.) Swan's caſe, Foſt. 104.

Lord Hale and Mr. Juſtice Foſter ſay, that a perſon guilty of petit treaſon may be indicted of murder; though the latter thinks it more adviſeable for the court to diſcharge the jury of that indictment, and order an indictment for petit treaſon to be preferred; becauſe the judgment is different, and alſo the trial in reſpect of the number of challenges, which in petit treaſon is 35. In Swan's caſe, whoſe trial was poſtponed after he had been arraigned upon an indictment for murder, to which he had pleaded, it was thought more adviſeable to prefer a new bill charging him with petit treaſon, on which he was afterwards convicted. But upon an indictment

dictment for petit treaſon, if the killing of the deceaſed with malice be proved, but not the relation between the parties; or if the fact can only be proved by one witneſs, or by the examination of the deceaſed before a magiſtrate by virtue of the ſtat. of Ph. & M. (*a*), the priſoner may be found guilty of murder upon that indictment, and acquitted of the treaſon. And the ſame was done in Radburne's caſe upon an indictment and inquiſition for petit treaſon, by the direction of Wilſon J., which was afterwards approved of by the judges on a conference. By a parity of reaſoning, the priſoner upon ſuch an indictment may be acquitted of the treaſon and found guilty of manſlaughter.

Ch. V. § 103. *Indictment and verdict.*

1 Hale, 184. 192. Henrietta Radburne's caſe, O. B. July 1787. MS. Buller J. *Vide* poſt. S. C. ſ. 124.

1 Hale, 378. 2 Hale, 292.

Likewiſe, one may be charged with petit treaſon and another with murder in the ſame indictment. And ſuch indictment concluding that they "feloniouſly, traiterouſly, "and of malice aforethought murdered," &c. is good for both, reddendo ſingula ſingulis. But if they cannot agree in their challenges, they muſt be tried ſeparately; the one being entitled to 35, the other only to 20 challenges.

Foſt. 329. Swan's caſe, ib. 104, 7. Daliſon, 16.

Foſt. 337.

Auterfoits acquit, ſays Lord Hale, upon an indictment for murder, is a good bar to an indictment for petit treaſon, and e converſo. Mr. Juſtice Foſter however ſpeaks with more heſitation of the former caſe.

2 Hale, 246. *Vide* Foſt. 328, 9.

An appeal of death lies as well in petit treaſon as in murder.

Foſt. 323.

The ſtat. 1 Ed. 6. c. 12. expreſsly requires two witneſſes upon the indictment and at the trial, as well in petit treaſon as in high treaſon. The ſtat. 5 & 6 Ed. 6. c. 11. by general words extending to all treaſons, requires that the witneſſes, if living, ſhall be examined in perſon upon the trial, in open court. For the fuller conſideration of which ſtatutes I muſt refer to the chapter upon high treaſon. The ſtat. 1 & 2 Ph. & M. c. 10. enacting, that the trial for any treaſon ſhall be according to the courſe of the common law, includes petit treaſon; and it ſeems to follow from thence that the trial per medietatem linguæ is taken away, which is the opinion of Mr. Juſtice Foſter.

§ 104. *Witneſſes and trial.*

1 Ed. 6. c. 12. ſ. 22. Foſt. 227, 233. 328. 337. 5 & 6 Ed. 6. c. 11. 2 Hale, 184. 269. 339. Ante, p. 123, &c. 1 & 2 Ph. & M. c. 10. ſ. 7. 3 Inſt. 24. 27. *Vide* 1 Hale, 316. Foſt. 337.

As to other general matters relating to petit treaſon and murder, they are conſidered under the appropriate branches of the general head of Homicide. And miſpriſion of petit treaſon is included under the former general title of miſpriſion of treaſon.

Ante, 139.

(*a*) St. 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10. extending only to *Felonies.*

Ch. V. § 105. *Indictment and evidence.*

Of the Indictment, and Appeal, and Evidence.

§ 105. *General rules.*

The peculiarities in the form of indictments and appeals for homicide relate principally to the manner of describing the fact whereby the death was occasioned, and the evidence applicable thereto: but I shall also advert to some general rules touching these matters.

Indictment for murder most usual in cases of homicide. 1 MS. Sum. 33. 2 Hale, 60. 158.

In most cases where justice requires that a man should be put upon his trial for killing another, it is usual (and proper, if there be any doubt) to charge him in the indictment for murder, because in many instances it is a complicated question; and no injury can thereby happen to the individual at all comparable to the evil example of a lax administration of justice in this respect: for the verdict and judgment will still be adapted to the nature of the offence, such as it appears upon the evidence. And where a party is committed upon such a charge, he may be brought up by habeas corpus before the court of K. B., and if a clear case be laid before the court, whereby the homicide appears to be either justifiable or excusable, they will upon view of the depositions and commitment admit the party accused to bail; as in Mrs. Barney's case, (temp. W. 3.) where the charge clearly appeared to be groundless. But justices of peace ought not to bail in such cases, but should commit till the next coming of the justices of gaol delivery. And even where the offence, if specially presented, would be short of felony, the prisoner if charged with murder has this advantage, that an acquittal thereof is a perpetual bar against any other indictment for the same death.

Vide Latch. 12. T. Jones, 222. Co. Entr. 356. b.

MS. Tracy,

1 Hawk. ch. 29. s. 23.

2 Hale, 158.

Appeal. 2 Inst. 316. Latch. 226.

No appeal lies for homicide less than manslaughter.

§ 106. *Presumption of malice from the fact of killing.* Fost. 255. 290. 1 Hale, 455. 471. Kel. 27. 50. 1 Hawk. ch. 31. s. 32. 4 Blac. Com. 201. Ante, s. 12.

On every charge of murder, the fact of killing being first proved, the law presumes it to have been founded in malice until the contrary appear: and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts so alleged the jury alone are to decide; but whether, taking them to be true, the homicide be justified, excused, or alleviated, is a matter of law upon which the jury ought to be guided by the direction of the court.

As to the Form of the Indictment.

Ch. V. § 107. *Manner of death.*

§ 107.

It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected; and an omission in this respect is not aided by a general conclusion, that the defendant so murdered, &c. This in the case of an appeal is necessary, not only at the common law, but by the stat. of *Glouc'ester*, *c.* 9. which expressly requires, that it shall *declare the deed*. And therefore if a person be indicted or appealed for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the mean of death proved agree in substance with that charged, it is sufficient. Thus where the death is occasioned by any weapon, the name or description of that weapon ought to be stated; yet if it appear that the party were killed by a different weapon, it maintains the indictment: as if a wound or bruise be alleged to be given with a sword, and it prove to be with a staff, or axe, this difference is immaterial. And the same if the death be laid to be by one sort of poisoning, and it turn out to be by another: but some sort or other must be alleged in the indictment; which ought in this as well as all other respects to be as closely adapted to the truth as possible. In Sharwin's case the indictment was for assaulting one with a certain offensive weapon commonly called *a wooden staff*, with a felonious design to rob him; and it proved to be with a stone; and held well, upon a conference between the judges: for they produce the same sort of mischief, namely, by blows and bruises; and this would be sufficient on an indictment for murder.

2 Hawk. ch. 23. s. 79. 84. ch. 25. s. 57.

2 Hale, 185. Sum. 265. 4 Blac. Com. 196. 2 Hawk. ch. 46. s. 37. 2 Inst. 319.

Sharwin's case, Oakham 8th July 1785, coram Gould J.

In Mich. T. 1785, MS. Buller J.

§ 108. *How the instrument was holden, and the value of it.*

Where the death is occasioned by any instrument holden in the hand of the party killing at the time, it should be so alleged; which is either done by stating that it was holden in both hands, or in the right or left hand; though I do not find the grounds for this particularity; and Hawkins does not mention this in enumerating the necessary requisites in an appeal or indictment. Regularly also the value of the instrument should be stated, or else it should be alleged to be of no value. The reason of which is, that the weapon whereby the death of a man is caused is a deodand forfeited

2 Hale, 185. *Vide* 2 Hawk. ch. 23. s. 75, 80. &c.

Ch. V. § 108. *By what inſtrument, and how holden.*

to the king; and the townſhip ſhall be charged for the value, if delivered to them. But this ſeems not to be eſſential.

§ 109. *Alleging the ſtroke.*
2 Hale, 184. Sum. 207. Lorkin's caſe, 1 Bulſtr. 124. MS. Tracy, 55. 2 Inſt. 319. 2 Hawk. ch. 23. ſ. 82. Cro. Jac. 635. Dy. 99. Long's caſe, 5 Co. 122.

Where the death is occaſioned by a wound, bruiſe, or other aſſault, the ſtroke ſhould be expreſsly laid. For want of this an indictment ſtating that the party of malice aforethought murdered or gave a mortal wound, without ſaying that he *ſtruck*, &c. was holden bad. Yet Hawkins obſerves, that in Croke's report this opinion ſeems to be queſtioned: and adds, that he finds no reaſon given why that word ſhould be of ſuch abſolute neceſſity, it not being ſo much as pretended in Long's caſe, which ſeems to be the chief foundation of the opinion, that it is an appropriate word of art: but that all that ſeems there contended for is, that where the death is occaſioned by any external violence coming under the notion of ſtriking, it muſt expreſsly appear that a ſtroke was given. However Hawkins ſays, that it is not ſafe to MS. Tracy, 55. omit the word where the fact will warrant it. Of courſe it cannot be neceſſary in the caſe of poiſoning, ſtarving, or the like, where no actual force is exerted or aſſault made.

§ 110. *Deſcription of wound.*
2 Hale, 185. 2 Hawk. ch. 23. ſ. 80. 4 Co. 40. b.

It ought to be ſhewn in what part of the body the deceaſed was ſtruck or wounded when the killing is of that ſort. Therefore if it be ſaid to be on the arm, hand, or ſide, without ſaying either right or left, it is not good: or if it be only ſaid *about* the breaſt. And if any of the wounds be laid with uncertainty, the laying of others with ſufficient certainty will not help the indictment; if there be a general concluſion that the party died of the wounds above mentioned. But where there is a ſufficient certainty, the addition of a further uncertain deſcription of the ſame wound will not vitiate it; for the latter may be rejected as ſurpluſage.
2 Hale, 186. 2 Hawk. ch. 23. ſ. 81. 2 Inſt. 318. 4 Co. 42. a.
Regularly too the length and depth of the wound is to be ſhewn; but this is not neceſſary in all caſes, as where a limb is cut off, or the death be effected by bruiſes: and if a man be ſhot or run through the body, it ſeems ſufficient to ſay that the defendant ſtruck the perſon killed in ſuch a part of his body, and gave him in ſuch a part a mortal wound,
2 Hale, 186. penetrating into and through his body. But in regard to much

much of what is ſaid above, this is to be noted, that though the manner and place of the hurt and its nature be requiſite to be ſtated as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if upon evidence it appear to be another kind of wound in another place, of which the party died, it is ſufficient to maintain the indictment. The reaſon ſtated in the books for requiring this minute particularity is, that the court may ſee that the wound was of ſuch a nature from whence death might enſue. In all caſes of doubt therefore a ſtatement ſufficient for that purpoſe ſeems to be enough.

Ch. V. § 110. *Deſcription of wound.*

Vide 2 Hawk. ch. 23. ſ. 81. 2 Inſt. 318. 4 Co. 40. b.

§ 111. *Death by means ſtated to be alleged.*

But in all caſes the death by the means ſtated muſt be poſitively alleged, and cannot be taken by implication: and therefore where the mean of death is alleged to be by any ſtroke, the indictment ſhould proceed to aver that the priſoner thereby gave to the deceaſed a mortal wound or bruiſe whereof he died; or where by poiſon, after ſtating particularly the manner of the poiſon's being adminiſtered, that the party died of the poiſon ſo taken and the ſickneſs thereby occaſioned. Merely ſtating the death to be by means of raviſhing an infant (waving the queſtion whether ſuch a mean of death could be deemed murder), without any allegation that the wound, bruiſe, or hurt was mortal, was holden not to be ſufficient.

2 Hale, 186.

1 Hawk. ch. 23. ſ. 82, 83. 4 Kel. 125.

Lad's caſe, Eaſter Term 1774. before all the judges at Serjeants' Inn, MS. Gro. Caſ. Reſ. and MS. Gould J. Leach. 91. S. C.

§ 112. *Time and place:*

It is neceſſary to allege the time and place as well of the wound as of the death; the latter in order that it may appear that the offence is cognizable by the court before whom the party is tried. And where by the ſtat. 2 & 3 Ed. 6. c. 24. the party is indicted in the county where the death happened, though the ſtroke were given in another, yet ought the ſtroke to be alleged in the county where it really was. The ſtat. of Glouceſter, (6 Ed. 1. c. 9.) requires alſo the vill or town to be named in appeals. The like rule is to be obſerved in the indictment of offenders under the ſtat. 28 H. 8. c. 15. and 33 H. 8. c. 23. for murders committed on the ſea or in other places there named; the offence muſt be alleged where committed. The reſpective times of the wound and death are alſo required to be ſhewn in order that it may appear

2 Hale, 179. 186. 2 Hawk. ch. 37. ſ. 6. 2 Hawk. ch. 23. ſ. 33. 90. 91. 3 Inſt. 49. 53. Ealing's caſe, poſt. ſ. 133. *Vide* Cotton's caſe, Cro. Eliz. 738. 2 Inſt. 319.

Ut ſupra, and 1 Hale, 412. 426. 8. 1 Hawk. ch. 31. ſ. 9, 10. 3 Inſt. 53.

Ch. V. § 112. *Time and place.*

pear that the deceaſed died within a year and a day from the ſtroke or other cauſe of death; in the computation of which the day on which the act was done ſhall be reckoned the firſt. This may be done either by ſtating that he died inſtantly of the wound, or that he languiſhed of the ſame till the day mentioned, when he died of the ſaid mortal wound. The ſame law as to the computation of time holds in the caſe of an inquiſition of felo de ſe. But though the day or year be miſtaken, yet it is not material; if it appear by the evidence that the death happened within the time limited; without which the law does not attribute the death to the ſtroke or poiſon. In appeals indeed the ſtat. of Glouceſter, c. 9. requires alſo the hour to be ſtated; but it has been holden that an omiſſion in that reſpect is not fatal; becauſe the common law did not require it, and the ſtatute is in the affirmative. Yet the uſual way is to allege, that the fact was done *about ſuch an hour*: but a variance in the evidence is immaterial. That ſtatute alſo requires the year, and time of the king's reign, to be given to the ſtroke and death.

2 Inſt. 318. 4 Blac. Com. 197. Pult. de pace, 125. a.

6 Ed. 1. c. 9. 2 Hawk. ch. 23. ſ. 33. 86, 87. 88. 2 Inſt. 318.

§ 113. *Evidence of death from cauſe alleged. Vide* references to laſt ſection. 1 Hale, 428. 1 Keb. 17. Mo. Burnet, 53.

As to what ſhall be deemed ſufficient evidence of the death having happened from any prior injury; it is obſervable, that though the ſtroke were not ſo mortal in itſelf but that with good care and under favourable circumſtances the party might have recovered; yet if it were ſuch from whence danger might enſue, and the party neglected it, or applied inefficacious medicines, whereby the wound which at firſt was not mortal in itſelf turned to a gangrene or produced a fever, whereof he died, the party ſtriking ſhall anſwer for it, being the mediate cauſe of the death. This was holden in Rew's caſe, which was afterwards agreed to be law at the Old Bailey by Lord Ch. J. Parker and Tracy J. The ſame rule holds if a man's death be haſtened by a ſtroke which irritates and increaſes a diſeaſe which he had before, though poſſibly he would otherwiſe have died in a ſhort time; for, as Rolle C. J. ſaid, an offender of ſuch a nature ſhall not apportion his own wrong. But if the hurt given were not dangerous in itſelf, but with ill application or otherwiſe the party die; and it clearly appear that the death was owing to ſuch application and not to the hurt received, though

Rew's caſe, Kel. 26. MS. Tracy, 53.

admi-

administered in consequence of such hurt; it is not homicide.

Ch. V. § 113. *Evidence of cause of death.*

If the name of the deceased be not known, it may be laid to be a certain man to the jurors unknown. But in an appeal his name must be shewn, for none but the widow or heir can bring such appeal. But it is not necessary, though usual, to allege that the party stricken was in the peace of God and of the king.

§ 114. *Name of deceased.* 2 Hale, 181. 6. 2 Hawk. ch. 23. s. 78. 3 MS. Sum. 45. 22 Ass. 106. 4 Co. 41. b.

It is very unusual and always unnecessary to state more of the special circumstances of the case in an indictment for murder, than what are comprised in the rules here specified. Nevertheless, if an indictment set forth all the special matter in respect whereof the law implies malice, a variance between the indictment and the evidence is not material, provided the substance of the matter be found. As where an indictment for the murder of a serjeant at mace in London, upon an arrest, supposed that the sheriff made a precept to such serjeant for the arrest; and upon the evidence it appeared that there was no such precept, but that the serjeant made the arrest ex officio at the plaintiff's request upon the entry of the plaint, according to the custom of the city: for the substance of the matter was, whether the defendant killed an officer in the lawful execution of legal process.

§ 115. *Special circumstances of the case.* 2 Hawk. ch. 46. s. 41. Mackalley's case, 9 Co. 62, 3. 7.

The act by which the death is occasioned, whether it be by means of any assault or force upon the person, or by craft, as poisoning or the like, must not only be stated to be done feloniously in common with other indictments of appeals for felony, but must be alleged to be done *of malice aforethought*, in order to constitute the offence murder. And it is equally necessary to state that the defendant *murdered* the deceased; for this is a term of art, and cannot be otherwise expressed. An indictment for manslaughter merely charges that the defendant feloniously *slew* or *killed* the deceased. And death by misadventure or chancemedley is charged to have been done *casually, and by misfortune, and against the will of the defendant*. If an indictment barely allege that the mortal stroke

§ 116. *Terms of art.* 1 Hale, 466. 2 Hale, 184, 186, 7. 344. Post. 256. 303, 4. 2 Hawk. ch. 23. s. 77. 83. ch. 25. s. 55. 4 Blac. Com. 307. Yelv. 205. Cro. Jac. 283. MS. Barnet, 43. 1 Bulstr. 144. Dy. 69. a. 261. a. 4 Co. 39. b. 41. Kel. 124. 1 Hale, 450. 466.

Ch. V. § 116. *Terms of art.*

ſtroke was given *felonioufly*, or that the defendant *murdered*, &c. without adding *of malice aforethought*; or if it only charge that he *killed* or *ſlew*, without averring that he *murdered* the deceaſed, the defendant can only be convicted of manſlaughter. In appeals it was formerly the courſe only to charge the fact to have been done nequiter et in feloniâ, omitting "of malice aforethought." But other and later precedents follow the form of indictments for murder; which now ſeems the proper way. In petit treaſon the indictment or appeal further charges the fact to have been done *traiterouſly*. Where the indictment charges that A. felonioufly and of his malice aforethought aſſaulted B. and with a ſword, &c. *then and there* ſtruck him, &c. the firſt allegation of "*felonioufly and of his malice aforethought*" applied to the aſſault runs alſo to the ſtroke, to which it is eſſential. An indictment againſt Mary Nicholſon, for poiſoning Elizabeth Atkinſon, ſtated that the priſoner "*did wilfully, felonioufly, and of her malice aforethought* mix poiſon, viz. white arſenic with flour and milk, with intent that the ſame ſhould be afterwards baked and eaten by the deceaſed, *and* the ſaid flour and milk ſo mixed with the poiſon as aforeſaid did, with the intent aforeſaid, *then and there deliver to the deceaſed*," &c. This was holden ſufficient by all the judges, without adding the words "felonioufly and of her malice aforethought" again to to the allegation of the delivery of the poiſon. For they conſidered that thoſe words firſt mentioned ran through the ſubſequent allegation, coupled as they were by the word *and*, and the words *then and there*. In the ſame caſe it was alſo ruled that the allegation of ſuch *delivery* of the poiſon to the deceaſed was proved by ſhewing that the priſoner put the poiſon in a pudding meal which was in a bowl in the milk-houſe, from whence it was taken by the deceaſed as uſual to make the pudding for the family, and afterwards eaten by her.

Foſt. 256. 1 MS. Sum. 159. Staundf. 78. b. 79. b. *ſed vide* Foſt. 323. Co. Entr. 53. b. 56. b. 57. 59. 5 Burr. 2647. 2 Hale, 178 184. 2 Hawk. ch. 23. ſ. 88.

Mary Nicholſon's caſe, before Rooke J. Durham Sum. Aſſ. 1798, MS. Jud.

Upon a conference of the judges, 6th Nov. 1798. (abſent Eyre C. J.)

33 H. 8. c. 8. 2 Hawk. ch. 23. ſ. 85. ch. 25. ſ. 90, 91. 2 Hale, 287.

The words "*with force and arms*" are not neceſſary in an appeal any more than in an indictment for this offence, being ſo fully implied.

For other general requiſites of an indictment for the various kinds of homicide in common with other offences, I refer for brevity ſake to the general head of Proſecution by indictment.

If

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If the bill of indictment be for murder, and the grand jury return it only a true bill for manſlaughter, and ignoramus as to murder, the uſual courſe has been ſaid to be, in the preſence of the grand jury, to ſtrike out "*maliciouſly*" and "*of malice aforethought*" and the charge of *murder*. Though Lord Hale thinks it better to preſent a new bill to them for manſlaughter. And though the ſame indictment may charge one with murder and another with manſlaughter, yet certainly if it charge both with murder, the grand jury cannot find it a true bill againſt one, and manſlaughter as to the other; but it is a good finding againſt the one for murder, and there ought to be a new bill againſt the other for manſlaughter.

Alterations by grand jury on different findings. 2 Hale, 162. 1 Roll. Rep. 408. 1 Sid. 230.

Cary's caſe, 3 Bulſtr. 206. Poſt. 350.

§ 117. *Apt concluſion.* 2 Hawk ch. 23. ſ. 88. ch. 25. ſ. 55. Kel. 125.

Finally, the murder is charged upon the party by way of concluſion, and as a conſequence from the antecedent matter, which is poſitively alleged, to the following effect: "and ſo the ſaid A. him the ſaid B. in manner and by the "means aforeſaid felonioufly, wilfully, and of his malice "aforethought did (poiſon) kill and murder." The ſame concluſion ſeems now to be the moſt proper in appeals. And ſuch a general concluſion is peculiarly applicable where the ſtroke, &c. is at one time or place, and the death at another; but in thoſe caſes if the day be ſpecially alleged, it ſhould be that on which the party died, and not that on which he was ſtricken; for it is no murder till he die; and if it be otherwiſe averred it is naught.

Ante, 346. 2 Hawk. ch. 23. ſ. 79. 1 Hale, 427. 2 Hale, 188. 2 Hawk. ch. 23. ſ. 88.

§ 118. *Indictment on ſtat. of ſtabbing.* 1 Jac. 1. c. 8. 1 Hale, 468. Cro. Cir. Comp. 312. Poſt. 299.

With reſpect to offenders againſt the ſtatute of ſtabbing, (1 *Jac.* 1. *c.* 8.) it is ſaid to have been uſual to prefer two indictments, one for murder, and the other for manſlaughter under the ſtatute; and to put the priſoner to plead to both; and to charge the jury with the indictment for murder. But as all the ſubſtantial purpoſes of juſtice may be anſwered by either of theſe indictments, I ſee no reaſon for this practice. The indictment for killing under the ſtatute muſt be ſpecially formed purſuant thereto, in order to ouſt the priſoner of his clergy; namely, that he did with a ſword, &c. *ſtab* the deceaſed, *he having no weapon drawn, nor having ſtruck firſt*; otherwiſe it will be but manſlaughter at common law. And it alſo ſeems neceſſary to allege the death

Ante, ſ. 28.

of

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of the party within ſix months after the ſtab or thruſt, according to the requiſition of the ſtatute, or at leaſt it ſhould ſo appear to have been upon the face of the indictment. How far any omiſſions in theſe reſpects may be ſupplied by a recital of the ſtatute, or an apt concluſion, will be noticed in another place.

Vide *general title Proſecution by Indictment.*

2 Hale, 468, 469. 1 Hawk. ch. 30. ſ. 9. 2 Hawk. ch. 25 ſ. 115. Sum. 266. Poſt. 349. Ante, ſ. 28. &c.

But though the indictment uſually conclude "againſt the form of the ſtatute," and therefore it is beſt to follow the common uſage, yet ſuch concluſion is not neceſſary, becauſe the ſtatute makes no new offence, but only takes away clergy from the old one. From hence too it follows that if the offence be taken out of the ſtatute by the evidence, yet the defendant may be found guilty of manſlaughter at common law notwithſtanding ſuch concluſion. On the other hand, a conviction on this ſtatute has been holden ſufficient to anſwer the inquiſition for murder. John Cowland was indicted on the ſtatute for killing Andrew Skanning, and was at the ſame time charged on an indictment for murder, and on the coroner's inquiſition for the ſame, and being found guilty on the ſtatute, he had judgment on all together.

John Cowland's caſe, O. B. Dec. 1700, per Turton and Powell Js. Serjt. Forſter's MS.

Clergy.
1 Hale, 468.
2 Hale, 344.
2 Hawk ch. 30. ſ. 9.
Poſt. ſ. 121.

No other being ouſted of clergy by the ſtatute but he who actually ſtabs or thruſts, the fact muſt be laid truly. Wherefore if A. be indicted for ſtabbing, and B. and C. for aiding and abetting; and it be found that B. gave the ſtroke, and that A. and C. were aiding and abetting; not only A. and C., but B. alſo, ſhall have their clergy; becauſe the indictment brings him not within the ſtatute; but they may all be found guilty of manſlaughter at common law; as B. and C. might be if A. had been proved to have ſtabbed the party as laid; in which caſe A. would be ouſted of clergy; and this notwithſtanding the aiding and abetting is alſo laid to be *againſt the form of the ſtatute*; which is inſenſible, and ſhall be rejected as ſurpluſage: and ſo the aidors and abettors may be puniſhed as for manſlaughter at common law, though the verdict of guilty purſued the indictment.

(Lord Cornwallis's caſe, Dom. Proc. 1678, 2 St. Tr. 730.)

§ 119. *Indictment on ſtat. 21 Jac. 1. for concealing the death of baſtard.* 2 MS. Sum. 488.

The indictment on the ſtat. 21 Jac. 1. c. 27. for concealing the death of a baſtard child, in order to put the mother upon proof by one witneſs that it was born alive, muſt charge

charge that she was delivered of a child (male or female), which by the laws of the kingdom was a bastard; that it was born alive; and some manner of killing it must be alleged, as by strangling or otherwise: but it is not necessary to conclude contra formam statuti; nor to charge that the mother concealed the death, though it be necessary to prove it; for the statute creates no new crime, but only makes the concealment evidence of having murdered it. This was settled in Ann Davis's case by the advice of all the judges, upon a search of precedents, which were all found to have been drawn in that form after the 4th of Car. 1.

Ch. V. § 119. *On 21 Jac. 1. for concealing death of bastard.*

2 Hale, 190. 288. 2 Hawk. ch. 46. s. 43. *Vide* ante, s. 15. and p. 348.

Ann Davis's case, Kel. 32.

It seems also from Peat's case, that if the indictment against the principal also charge the presence of an accomplice at the fact, there can be no conviction upon this statute; because it appears upon the very face of the record that there could be no concealment by the mother.

Jane Peat's case, ante, s. 15.

§ 120.

Some things are necessary to be added in respect to appeals of death, not referable to indictments. By the statute of Gloucester, c. 9. the appeal must be brought within a year and a day after the deed done; which is now settled to be computed from the day of the death, including that day; and as against an accessary after, from the day of the receipt. It may be brought either by a wife for the death of her husband, or by an heir for the death of his ancestor.

Form of appeal, vide *general title of prosecution by appeal.* 2 Hawk. ch. 23. s. 33. 64. 1 Hale, 427. 3 MS. Sum. 8.

In the first case she must be innocent of the fact, and prove herself lawful wife of the deceased: wherefore ne unques accouplez in loial matrimonie is a good plea in bar, and triable by the Bishop's certificate. But it is no defence that the wife had eloped from the deceased, or that he stood attainted. But a subsequent marriage, whether before or after the appeal commenced, is a bar; so that even after judgment she cannot pray execution: though it do not appear in this latter case but that the court ex officio, or at the demand of the king, may award execution, to prevent a failure of justice, as the attainder is a bar to any new prosecution.

By the wife. 2 Hawk. ch. 23. s. 36 to 38. 3 MS. Sum. 5. (printed page 181.) 2 Inst. 68.

2dly, The appeal of death by an heir, (who must be heir male; though deriving through a female is sufficient) can only be where the deceased left no wife, unless she were implicated

By the heir. 2 Hawk. ch. 23. s. 39 to 43. 3 MS. Sum. 6. 11. (printed page 181, 2, 7.) Staund. 59.

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plicated in the guilt; for though she marry afterwards, or die within the year and day, he cannot have an appeal. He must be heir general by the common course of the law, and not special heir by the custom, or one of the half blood. In every case it must appear by the writ or count in what manner the appellant is heir: and it follows that if the deceased were attainted, as he could have no heir, so there could be no appeal by any as such. But if the heir general himself be implicated, the next heir shall have the appeal against him as if he were dead without issue. But the appeal does not go over if the heir general be attainted or die, within the year and day. Neither in the case of the heir general dying after judgment can the next heir, as it seems, pray execution; though perhaps the court ex officio or on demand of the king may award it, for the reason before mentioned.

§ 121. *Accomplices.*

I come now to consider this part of the subject as it is applicable to accomplices and accessaries in general.

MS. Tracy, 55. cites 3 Bulstr. 206. ante, f. 58. 2 Hawk. ch. 31. s. 49. 2 Hawk. ch. 29. s. 7.

Several persons present at the death of a man may be charged with different degrees of homicide in the same indictment, as one with murder, another with manslaughter. For if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. But if the bill be framed for murder against two, and the grand jury find it a true bill as to one and manslaughter as to the other, there ought to be a new bill preferred for manslaughter against the last.

Ante, 347.

2 Hawk. ch. 23. s. 76.

1 MS. Sum. 483. Sum. 265. Foft. 351. 1 Hale, 437. 463. 2 Hale, 185. 292. 314, 345. 2 Hawk. ch. 46. s. 39. Plow. 98 100, 1. Mackally's case, 9 Co. 67 b. R. v. Borthwick and others, Doug. 207. Rex. Plummer, Kel. 109. Sand. 109. ante, s. 118.

In appeal where several are present at the fact, and one only actually does it, and the others abet him, the plaintiff may either elect to suppose in his declaration that all did the fact, or shew the special matter. For in these cases all the parties are principals, and the blow of one is in law the blow of all. For which reason an indictment that A. gave the mortal blow, and B., C., and D. were present and abetting, is sustained by evidence, that B. gave the blow, and A., C., and D. were present and abetting. Upon the like indictment, evidence that E., though not named therein, gave the blow, and that A., B., C., and D. were present and abetting, would be sufficient; or even that a person unknown gave the

blow.

blow. But it is otherwiſe, as I have ſhewn on the ſtatute of ſtabbing, being a particular law, and pointed at the actor himſelf. ante 247. Ch. V. § 121. *Accomplices.*

Whether if the perſon charged as principal be acquitted, a conviction of another charged in the indictment as preſent aiding and abetting him in the murder be good, was doubted by ſome judges in Shaw's caſe; though a majority of them at laſt thought the conviction proper; the indictment concluding that both murdered, &c., and the verdict finding that the priſoner did the fact. But no expreſs determination was made on the caſe, as it was thought by the judge who tried him a proper caſe for a pardon on the ſpecial circumſtances. *Acquittal of principal, conviction of abettor.* Alex. Shaw's caſe, Suſſex Sp. Aſſ. 1785, debated in Eaſt. and Trin. terms following, MS. Gould and Buller, Js., S.C. reported in Leach. 290. laſt edit. 398.

But this point was expreſsly decided in Wallis's caſe, which does not appear to have been referred to on the laſt-mentioned occaſion. That was an indictment againſt A. for murder, and alſo againſt Wallis and others as perſons preſent, aiding and abetting A., therein. A. was firſt tried upon this indictment and acquitted, and afterwards Wallis was tried upon it. And per Holt C. J. Though the indictment be againſt the priſoner for aiding, aſſiſting, and abetting A. who was acquitted, yet the indictment and trial of this priſoner is well enough; for all are principals, and it is not material who actually did the murder. Regina v. Wallis and others, Q. B. 1703, cor. Holt C. J. et al. Juſt. Salk. 334.

The abetment ſhould in all caſes be laid to the ſtroke, and not to the death, if they are laid on different days: or the allegation may be general, that the defendant was preſent, aiding and abetting at the felony and murder as aforeſaid, committed in manner and form aforeſaid. *How abetment laid.* 2 Hawk. ch. 23. ſ. 89. 4 Co. 42. b.

If the wife be an accomplice with her huſband in murder, ſhe ſhall anſwer for it notwithſtanding her huſband's preſence; contrary to the general rule of law in caſes of felony, which ſuppoſes her to act under his coercion. *Huſband and wife.* Kel. 31.

§ 122. *Acceſſaries.* Ante ſ. 121. Poſt. 361.

The ſame rule of evidence which I have above adverted to as governing the caſe of accomplices charged as principals, or vice verſâ, does not altogether apply to that of principals and acceſſaries, whoſe offences are of a more diſtinct nature: ſo far however as the offence charged and proved againſt an acceſſary is in ſubſtance the ſame, the ſame rule prevails.

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Sum. 265, 6. 2 Hawk. ch. 46. ſ. 40. Rex v. Winifred Gordon, Northampton Lent Aſſ 1789, MS. Buller J. *ante*, ſ. 81. and tit. Principal and Acceſſary S. C. *vide* 2 Inſt. 182.

prevails. Thus an indictment of A. as acceſſary to B. and C. is proved by evidence of his being acceſſary to B. only. But if two be indicted as principals, and it appear that one of them were acceſſary before, he ſhall be diſcharged of that indictment. In like manner one indicted as acceſſary before cannot be convicted upon evidence proving her to have been preſent aiding and abetting at the fact. This was the caſe of Winifred Gordon, who together with Thomas Gordon were indicted, for that *they* on the 23d July 1788 *made an aſſault* on George Linnel, a conſtable, in the execution of his office; that Thomas Gordon ſhot and killed him; and that Winifred Gordon "before the felony and murder aforeſaid by the ſaid T. G. in manner and by the means aforeſaid done and committed, to wit, on the ſaid 23d of July, with force and arms at, &c. then and there feloniouſly, wilfully, and of her malice aforethought did incite, move, inſtigate, ſtir up, counſel, direct, adviſe, and command him the ſaid T. G. the felony and murder aforeſaid in manner and by the means aforeſaid to do and commit;" and then concluded that both the priſoners "in the manner and by the means aforeſaid then and there feloniouſly, wilfully, and of their malice aforethought did kill and murder the ſaid George Linnell," &c. After argument in the Exchequer-chamber, it ſeemed to be the opinion of all the judges, though they differed in other reſpects, that this indictment only amounted to a charge as againſt Winifred Gordon of being an acceſſary before, though it charged her, as it ſhould ſeem improperly, with having joined in the aſſault againſt the deceaſed. And indeed the counſel for the proſecution admitted that it muſt be ſo conſidered upon the authority of Haydon's caſe; where it is holden neceſſary to charge a principal in the ſecond degree with being preſent aiding and abetting. But it was the opinion of all the judges that ſhe might be indicted again as principal; in which the four concurred, if, as the others thought, ſhe could not be convicted upon this indictment charging her as acceſſary before.

24th June 1789.

4 Co. 42. b.

2 Hawk ch. 23. ſ. 25. Lodowike Grevil's caſe, And. 195.

An indictment againſt one as acceſſary before to murder, charging that he "maliciouſly excited, moved, and procured," &c. is ſufficient to ouſt clergy, by force of the 4 & 5 Ph. & M.; the words whereof are, "that all

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perſons who maliciouſly *command, hire, or counſel* any perſon," &c.; for the counſelling another is neceſſarily included in the *exciting, moving, and procuring* him. And the word *wilful* [murder] in the ſtatute is ſufficiently expreſſed by laying the murder to be *of malice aforethought.*

Acceſſaries in another county. 2 Hawk ch. 29. ſ. 51. Lord Sanchar's caſe, 9 Co. 118.

Where acceſſaries in one county to a murder committed in another are indicted in the county where they became acceſſaries, under the ſtat. 2 & 3 Ed. 6. c. 24. ſ. 2. the indictment ought to recite the fact, that the principal committed the act in another county, and not barely that he was indicted for it there; for that is only an argument, and no direct averment that he did it.

§ 123. *No acceſſaries before in manſlaughter.* 1 Hale, 437. 450. 466.

As there can be no acceſſaries before to manſlaughter, it follows that an indictment againſt any one as ſuch is purely void. And ſo if the indictment be for murder, and the principal be only found guilty of manſlaughter, thoſe who are indicted as acceſſaries before muſt be diſcharged of that indictment: but not the acceſſary after, though the principal have his clergy, ſince the ſtat. 1 Ann. ſt. 2. c. 9. ſ. 1. which makes a conviction in this reſpect equivalent to an attainder. 2 Hawk. ch. 29. ſ. 24. 41, 2, 3, 4.

§ 124. *Declarations of deceaſed.* *Vide* general title Evidence in Felony. Rex v. Reaſon and Tranter, 6 St. Tr. 201, &c. 1 Stra. 499. Ealing's caſe, O. B. Dec. 1720, per King C. J. *vide* 12 Vin. Abr. 118.

Beſides the uſual evidence of guilt in general caſes of felony, which is elſewhere treated of, there is one kind of evidence more peculiar to the caſe of homicide, which is the declaration of the deceaſed after the mortal blow, as to the fact itſelf, and the party by whom it was committed. Evidence of this ſort is admiſſible in this caſe on the fulleſt neceſſity (*a*); for it often happens that there is no third perſon preſent to be an eye-witneſs to the fact; and the uſual witneſs on occaſion of other felonies, namely, the party injured himſelf, is gotten rid of. But in order to preſerve as far as

(*a*) But neceſſity is not the general ground of its admiſſibility: for evidence of the declaration of a convict at the time of his execution was offered upon the indictment of one Drummond for robbery, in order, as was ſuppoſed, to ſhew that he the convict was the perſon who had committed the robbery: but the evidence was rejected by Eyre B. and Gould J. on the ground that as the party was then attainted his teſtimony could not have been received even on oath; and conſequently not his dying declaration, which can only be admitted on the preſumption that it was made under the ſame ſanction as an oath. George Drummond's caſe, O. B. Sept. 1784, Leach, 278.

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Vide tit. Witneſs.

poſſible the purity and rectitude of ſuch evidence, it muſt appear that the deceaſed at the time of making ſuch declarations was conſcious of his danger; ſuch conſciouſneſs being conſidered as equivalent to the ſanction of an oath, and that no man could be diſpoſed under ſuch circumſtances to belie his conſcience: none at leaſt who had any ſenſe of religion. But ſuch conſciouſneſs need not have been expreſſed by the deceaſed; it is enough if it might be collected from circumſtances. And the court are to judge of this conſciouſneſs previous to the admiſſion of this ſort of teſtimony.

Woodcock's caſe, O.B. 1789, poſt. 356. and John's caſe, poſt. 357.

Margaret Tinckler's caſe, Durham, 1781, cor. Nares J. MS. Gould J. and MS. Crown Caſ. Res.

Margaret Tinckler was indicted for the murder of Jane Parkinſon, by inſerting pieces of wood into her womb. A ſecond count charged her as acceſſary before the fact. It was proved by ſeveral witneſſes, that from the firſt time of the deceaſed taking to her bed, which was on the 12th of July, ſhe thought ſhe muſt die, making uſe of different expreſſions, as, *that ſhe was going; that ſhe was working out her laſt*; and exclaiming, *Oh! that Peggy Tinckler has killed me.* She lingered till the 23d, when ſhe died. She never was up but once during that time, when on telling a friend who attended her that ſhe thought herſelf better, ſhe adviſed her to get up, which the deceaſed did, and walked as far as the paſſage going out of the room, but was forced to return and go to bed again. It appeared by the teſtimony of ſeveral witneſſes, that from the moment of her taking to her bed till the time of her death ſhe had declared, *that Tinckler had killed her and dear child*, (ſtating the particular means uſed, which agreed with the charge in the indictment.) And during the ſame period ſhe had declared more particularly, "that ſhe was with child by one P. a married man, who, being fearful leſt his wife ſhould hear of it if ſhe were brought to bed, adviſed her to go to the priſoner, a midwife, to take her advice how ſhe ſhould get rid of the child, being then five or ſix months gone." "That the priſoner gave her the advice" in queſtion, which ſhe followed accordingly. It was proved by the teſtimony of a witneſs, that three days before the delivery, which was on the 10th July, ſhe ſaw the deceaſed in the priſoner's bed-chamber, when the priſoner took her round the waiſt and ſhook her in a very violent manner ſix different times, and toſſed her

up

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up and down: and that ſhe was afterwards delivered at the priſoner's houſe. The deceaſed alſo declared during her illneſs, that after her delivery the priſoner gave her the child to take home; and bid her go to bed that night and ſleep, and get up in the morning and go about her buſineſs, and nobody would know any thing of the matter; but that appearing very ill the next day at a relation's houſe, they had ordered her to go home and go to bed, which ſhe did. The child was born alive, but died inſtantly; and the ſurgeons, who were examined, proved that it was perfect. There was no doubt but that the deceaſed had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes cauſed by the ſkewers, one of which was mortified, the other only enflamed; and other ſymptoms of injury appeared. A ſhort time before her death ſhe was aſked whether the account ſhe had from time to time given of the occaſion of her death, and the priſoner's treatment of her were true; and ſhe declared it was. It was objected that the above evidence of the deceaſed's declarations ought not to be admitted, as ſhe herſelf was particeps criminis, and likewiſe as it appeared at the time of her declarations ſhe was better, or thought herſelf ſo. But Nares J. was of opinion, that however this objection might hold with reſpect to the ſecond count, in which the priſoner was charged as an acceſſary with the deceaſed, yet the deceaſed was not willingly or knowingly an acceſſary to her own death; and therefore it was like the common caſe of any other murder. And as to the objection that ſhe once thought herſelf better, and tried to get up, yet the ſame declarations ſhe then made had been made repeatedly before to perſons whom in confidence ſhe told that ſhe never ſhould ſurvive, when ſhe firſt took to her bed; and ſhe had repeated the ſame declarations the day before ſhe died, and within a few hours of her death. And as to the fact itſelf, he was clearly of opinion it was murder, on the authority of Lord Hale. (1 Hale, 429.) The jury found the priſoner guilty on the firſt count, charging her as a principal in the murder, and execution being reſpited to take the opinion of the judges on the whole caſe, they all met to conſider of it: and were unanimouſly of opinion that theſe declarations of the deceaſed were legal evidence: First day of Mich. term 1781, at Serjeant's Inn.

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dence: for though at one time the deceaſed thought herſelf better, yet the declarations before and after and home to her death were uniform and to the ſame effect. And as to her being particeps criminis, they anſwered, that if two perſons be guilty of murder, and one be indicted and the other not, the party not indicted is a witneſs for the crown. And though the practice be not to convict on ſuch proof uncorroborated, yet the evidence is admiſſible; and here it was ſupported by the proof of the priſoner toſſing the deceaſed in her arms in the manner ſtated. Moſt of the judges indeed held that the declarations of the deceaſed were alone ſufficient evidence to convict the priſoner; for they were not to be conſidered in the light of evidence coming from a particeps criminis; as ſhe conſidered herſelf to be dying at the time, and had no view or intereſt to ſerve in excuſing herſelf, or fixing the charge unjuſtly on others. But others of the judges thought that her declarations were to be ſo conſidered; and therefore required the aid of the confirmatory evidence.

MS. Buller J.

R. v. Radburne, alias Gibbons, O. B. July 1787, cor. Wilſon J. MS. Buller J. *Vide* general title Evidence, Depoſitions, and 2 Leach. 512. S. C.

In the caſe of Henrietta Radburne, who was indicted for petty treaſon in murdering her miſtreſs Hannah Morgan, the depoſition of the latter before her death before a magiſtrate, by whom it was authenticated in the preſence of the priſoner, was read in evidence, though made by her when under no apprehenſion of danger: but this was evidence by force of the ſtatutes of Ph. & Mary (*a*): and the priſoner was convicted of the murder and acquitted of the petit treaſon; which was afterwards approved of by all the judges. And it was obſerved by many of them, that the ſtatutes of Philip and Mary do not extend to treaſon.

Woodcock's caſe, O. B. 1789, cor. Lord C. B. Eyre, Aſhburſt J. and Adair Serjt. Recorder, Leach, 397. new edit. 563. *Vide* Dingler's caſe, ib. 638.

In Woodcock's caſe it was conſidered, that ſuch an examination taken before a magiſtrate who attended for the purpoſe at the place where the deceaſed was then lying after the mortal wound received, and without hopes of recovery, not being taken in the preſence of the priſoner in the manner deſcribed by the acts (*a*), could not be received in evidence, quà examinations, after her death: but they were received as authentic declarations of the deceaſed in extremis, there being then no probability of her recovery, though ſhe herſelf expreſſed no ſenſe of her danger, but lay quietly reſigned and ſubmitting to her fate. In Trowter's caſe the court

Trowter's caſe, B. R. E. 8 G. 1. 10 Vin. Abr. 128.

(*a*) 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10.

would

would not admit parol evidence of the declarations of the deceaſed which had been reduced into writing.

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On the proſecution of Thomas John for the murder of Rachael his wife, it was proved by the confeſſion of the priſoner himſelf in converſation with others before his wife's death, that in September 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermoſt, and he had given her ſeveral violent kicks and blows, ſo that according to his own words, he knew ſhe never would raiſe her hand againſt him again. It was alſo proved that ſhe died in the ſame month; that ſhe was taken ill on a Friday, took to her bed the next day, and died on the Sunday ſevennight following, being confined to her bed by her illneſs, which was ſevere, the whole time. But it did not appear that ſhe had expreſſed any apprehenſion of danger, though ſhe retained her ſenſes till the day before her death. Three witneſſes depoſed to converſations during her illneſs, at which the huſband was preſent, in which ſhe attributed her ſituation to his ill treatment; and the conduct and anſwers of the huſband were given in evidence, although it was objected on his behalf that what was ſaid by the wife even in the preſence of the huſband, and to which he returned anſwers tending to charge himſelf, ought not to have been received. Evidence was alſo given of her declarations in the priſoner's abſence, after ſhe was confined to her bed, all of which tended to ſhew the circumſtances of violence he had committed upon her. It was objected, that the declarations of the wife in the abſence of the priſoner ought not to have been admitted in evidence, as it was not proved that ſhe conſidered herſelf at the time as a dying perſon; the evidence not being expreſs on that head: but that if the evidence were admiſſible, it ought to have been left to the jury to conſider whether the wife were at the time conſcious of approaching death. Objection was alſo made, that theſe being declarations of a wife againſt her huſband were not on that account evidence. The court was of opinion, that the reaſon of the rule that a wife ſhall not be admitted to give evidence againſt her huſband did not apply to this caſe. And upon the other point, that the evidence of the ſtate of the wife's health, at the time the declarations were made, was

Thomas John's caſe, Carmarthen Sp. Seſſ. 1790, MS. Buller J. *Whether or not the declarations of the deceaſed were made under an apprehenſion of danger muſt be determined by the judge, in order to receive or reject the evidence, and not by the jury after the evidence is received. The apprehenſion of danger may appear either from the expreſs declaration of the deceaſed at the time, or may be inferred from the ſtate of the wound or illneſs or other circumſtances indicating the ſame.*

Vide general title *Witneſs.*

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ſufficient to ſhew that ſhe was actually dying; and that it was to be inferred from it, that ſhe was conſcious of her ſituation: and no particular direction was given to the jury on the ſubject. The jury having found the priſoner guilty, theſe points were referred to the judges; who at a conference in Eaſter term 1790 all agreed that it ought not to be left to the jury to ſay, whether the deceaſed thought ſhe was dying or not; for that muſt be decided by the judge before he receives the evidence. And if a dying perſon either declare that he knows his danger, or it is reaſonably to be inferred from the wound or ſtate of illneſs that he was ſenſible of his danger, the declarations are good evidence. But as to the declarations themſelves in this caſe, all the judges, except two, thought that there was no foundation for ſuppoſing that the deceaſed conſidered herſelf in any danger at all.

Henry Welbourn's caſe, Lincoln Sum. Aſſ. 1792, cor. Aſhhurſt J. MS. Buller J. To the ſame effect as the laſt caſe; and further, *If the deceaſed thought ſhe ſhould recover at the time the declarations were made, they ought not to be received in evidence.*

Upon the proſecution of Henry Welbourn for the murder of Elizabeth Page by poiſon, a witneſs depoſed that the deceaſed and the priſoner lived with her as her ſervants; that perceiving the deceaſed alter and appear very ill, ſhe taxed her with being with child, which ſhe owned, and the next day continuing very ill ſhe confeſſed ſhe had taken ſomething; at which time the witneſs believed that the deceaſed was ſenſible of her ſituation and danger, though ſhe did not ſay ſo. But when the apothecary came to ſee her the ſame evening ſhe ſaid that ſhe was very bad, and did not know if ſhe ſhould get the better of it. The apothecary himſelf depoſed that when he firſt ſaw the deceaſed ſhe was then apparently dying; but he believed that ſhe was not ſenſible of her danger; that after he had been with her ſome time he made her ſenſible of her danger, in order that he might get from her what ſhe had done. She deſired him to give her ſomething to eaſe her pain. He told her he muſt firſt know what ſhe had done; and that ſhe would not live 24 hours unleſs proper relief were afforded. (She did not in fact live above an hour afterwards.) The witneſs had no other reaſon for thinking that ſhe knew her danger from any thing that ſhe ſaid, except that on his telling her of her danger ſhe told him what was the cauſe, which ſhe had before refuſed to do. She then deſcribed to him the ſymptoms of pain which ſhe had felt, and again repeated that ſhe wiſhed

wiſhed he would give her ſomething to compoſe her. The witneſs then again urged the neceſſity of knowing the cauſe of thoſe ſymptoms, and ſhe told him with reluctance, that ſhe had been three or four months gone with child, and that during the laſt fortnight ſhe had been conſtantly prevailed upon to take bitter apple in order to procure an abortion; but that not producing the deſired effect, the perſon had prevailed on her to take a white powder, (which was the day before ſhe was taken ill,) and that the ſymptoms came on in about three or four hours after. The witneſs then urged her to ſay by whom ſhe had been prevailed upon, when with increaſed reluctance and heſitation ſhe told him it was by her fellow-ſervant Welbourn; and that he had prevailed upon her by aſſuring her that there was no crime in procuring an abortion whilſt the child was ſo young. At this moment ſhe was free from pain, and the witneſs thought that a mortification had taken place. From the deceaſed's deſcription of the white powder, and from the inſpection of the body afterwards, the witneſs believed it to be arſenic. On his croſs examination he ſaid that at the time ſhe made this declaration he believed that ſhe thought ſhe was getting well from the being ſo free from pain. It appeared from other witneſſes that on the day when the deceaſed had ſaid that ſhe had taken the white powder, the priſoner and ſhe were obſerved in diſcourſe together; and he was ſhaking a bottle of ſomething: and he had before applied for ſome bitter apple, which the witneſs had refuſed to get him. It was left to the jury to conſider, whether from the whole of the evidence they were ſatisfied that the deceaſed at the time ſhe made the declarations was ſatisfied of the danger of her ſituation? and whether they thought thoſe declarations true? and that her death was owing to poiſon adminiſtered by the priſoner? in which caſe they ſhould find him guilty. The jury accordingly found him guilty. But a doubt afterwards occurring to the learned judge, whether, though in the firſt part of the apothecary's evidence he ſwore that he made the deceaſed ſenſible of her danger before ſhe made the declaration, yet as he afterwards ſaid that at the time ſhe made the declaration *ſhe believed that ſhe was getting better from the pain ceaſing*, he ſhould not have re-

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Vide poſt. 360.

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jected the evidence and directed an acquittal: the priſoner was therefore reſpited to take the opinion of the judges on the caſe. In Michaelmas term 1792 a majority of the judges were of opinion that it did not ſufficiently appear that the deceaſed knew or thought ſhe was in a dying ſtate when ſhe made the declaration: on the contrary ſhe had reaſon to think that if ſhe told what was the matter with her ſhe might have relief and recover. But as to what the apothecary had ſaid on his croſs examination they laid no ſtreſs on it, being mere opinion unwarranted by fact. And they all agreed that whether the deceaſed thought herſelf in a dying ſtate or not was matter to be decided by the judge in order to receive or reject the evidence, and that that point ſhould not be left to the jury (*a*).

§ 125. *Articles of war.* Rex v. Withers, Staff rd Aſſ 1784, cor Buller J. and by all the judges in Mich term 1784, MS. Gould and Buller Js. 5 Term Rep. 446.

The articles of war are frequently required to be given in evidence on proſecutions for homicide: for it has been ruled that the Court cannot take judicial notice of them without their being proved: but that a copy, purporting to be printed by the king's printer, is ſufficient. In Withers's caſe, there being no ſuch evidence, nor any evidence of the uſage of the army, it was holden that the priſoner, who was a private ſoldier, and had killed the deceaſed a ſerjeant in the ſame regiment, upon an arreſt by the latter, and after a ſtruggle between them, could only be guilty of manſlaughter.

§ 126. *Trial.*

Of the Trial, Arraignment, Verdict, and Judgment.

Where this offence may be examined into and tried is the next object of inquiry; and this reſolves itſelf into ſeven different conſiderations. 1. Where the ſtroke and death happen in the ſame county. 2. Where they happen in different counties. 3. Where one is acceſſary in one county to a murder committed in another. 4. Where both the ſtroke and death happen in Wales, or one in Wales and the other in an Engliſh county. 5. Where the one happens at ſea or out of England and the other within a county.

(*a*) Vide Woodcock's caſe, O. B. 1789, Leach. 397. where that fact was left to the jury by Ld. C. B. Eyre.

6. Where

6. Where both the ſtroke and death happen at ſea; or, 7. In parts beyond the ſea. Ch. V. § 126. *Trial.*

§ 127. *Stroke and death in ſame county.*

1. Regularly by the common law in this as in other matters of criminal juriſprudence the offence muſt be inquired of and tried in the ſame county in which it was committed. But the ſtat. 33 Hen. 8. c. 23. enacts, that upon examination before three of the counſel, treaſons, miſpriſions thereof, and murders, committed in any place within the king's dominions or without, may be inquired of, heard, and determined in any county where the king by his commiſſion of oyer and terminer ſhall appoint. This ſeems not repealed by the ſtat. 1 & 2 W. & M. c. 10. as to murder; the circumſtances required by the ſtatute of Henry 8. being obſerved; which I ſhall preſently have occaſion to mention again. 3 Inſt. 27. 1 Hale, 283. 374. 2 Hale, 22. 163, 4. 2 Hawk. ch. 25. ſ. 35, 36. 33 H. 8. c. 23. Ely's caſe, O. B. Dec. 1720. Roache's caſe, Dec. 1775. Poſt. ſ. 133.

If a perſon be ſtricken and die in the county of A., and the body be found in B., it ſhall be removed into A. for the coroner of that county to take the inqueſt. 2 Hale, 66. 1 MS. Sum. 54.

Alſo by the ſtatute of Articuli ſuper chartas, c. 3. ſpecial proviſion is made concerning homicide within the verge. *Verge.* 2 Inſt. 549, 550. 2 Hale, 54.

§ 128. *Stroke and death in different counties.*

2. Where the ſtroke and death are in different counties, it was doubtful at common law whether the offender could be indicted at all, the offence not being complete in either; though the more common opinion was, that he might be indicted where the ſtroke was given; for that alone is the act of the party, and the death is but a conſequence, and might be found though in another county: and the body was removed into the county where the ſtroke was given (*a*). But now by the ſtat. 2 & 3 Ed. 6. c. 24. ſ. 2. it is enacted, "that "where any perſon ſhall be feloniouſly ſtricken or poiſoned "in one county, and die of the ſame ſtroke or poiſoning in "another county, an indictment thereof found by jurors "of the county where the death ſhall happen, (whether "before the coroner, or before the juſtices, &c. having "authority to inquire, &c. which extends to the Court of 1 Hawk. ch. 31. ſ. 13. 2 Hawk. ch. 25. ſ. 36. ch. 29. ſ. 48, 49, 50. 1 Hale, 426. 2 Hale, 66. 163. Poſt. ſ. 131. 2 & 3 Ed. 6. c. 24. (1 MS. Sum. 54. 2 Hale, 66.) 3 Inſt. 49. 135. 2 Hawk. ch. 29. ſ. 52.

(*a*) That opinion, however, is contrary to the ſenſe of the legiſlature as expreſſed in the ſtat. 2 & 3 Ed. 6. c. 24. ſ. 2. which declares that "in ſuch caſe it hath not been found by the laws or cuſtoms of this realm that any ſuch indictment thereof can be taken in either of the ſaid two counties."

"King's

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" King's Bench in the county where it ſits, and to the lord " ſteward on the trial of a peer,) ſhall be as good and ef- " fectual in law as if the ſtroke or poiſoning had been " committed and done in the ſame county where the party " ſhall die, or where ſuch indictment ſhall be ſo found." By this the trial is now ſettled to be in the county where the death happens.

Appeal.

The ſame ſtatute (ſ. 3.) alſo provides, " that an appeal of " murder may be commenced, taken, and ſued in the ſame " county where the party ſo felonioufly ſtricken or poiſoned " ſhall die, as well againſt the principals as acceſſaries in " whatſoever county or place the acceſſaries ſhall be guilty. " And the juſtices before whom any ſuch appeal ſhall be " commenced, ſued, and taken within the year and day " after ſuch murder and manſlaughter committed and done " ſhall proceed againſt ſuch acceſſaries in the ſame county " where ſuch appeal ſhall be ſo taken, in like manner and " form as if their offence had been committed in the ſame " county where ſuch appeal ſhall be ſo taken, as well con- " cerning the trial by the jurors of ſuch county where ſuch " appeal ſhall be taken upon the plea of not guilty, as " otherwiſe."

1 Hawk. ch. 31. ſ. 13. 2 Hawk. ch. 23. ſ. 35. 7 H. 7. 8. b.

At common law the appellant had his election to bring the appeal in either county, in which caſe it was triable by a jury returned from each. This joinder is certainly unneceſſary under the ſtatute of Ed. 6. where the trial is in the county where the death happened. Yet it ſeems from ſome authorities that the election to proſecute the appeal in either county ſtill continues.

Bulwer's caſe, 7 Co. 2. and 2 Hale, 163. *Vide* 2 G. 2. c. 21.

§ 129. *Acceſſaries in one county to murder in another.* 1 Hale, 427. 2 & 3 Ed. 6. c. 24. ſ. 4.

3. At common law the coroner might upon view of the body in the county where the fact happened inquire of all acceſſaries or procurers, though in another county.

But by ſ. 4. of the ſtat. 2 & 3 Ed. 6. c. 24. " where any " murder or felony ſhall be committed in one county, and " another perſon ſhall be acceſſary thereto in any other " county, then an indictment found againſt ſuch acceſſary " and acceſſaries before the juſtices of peace or other juſtices " or commiſſioners to inquire of felonies in the county " where ſuch offence of acceſſary, &c. ſhall be committed,

" ſhall

" ſhall be as effectual in law as if the ſaid principal offence " had been committed within the ſame county where the " the indictment againſt ſuch acceſſary ſhall be found. And " that the juſtices of gaol delivery or oyer and terminer, or " two of them, of or in any ſuch county where the offence " of any ſuch acceſſary ſhall be committed, upon ſuit to " them made, ſhall write to the cuſtos rotulorum or keeper " of the records where ſuch principal ſhall be attainted or " convicted, to certify them whether ſuch principal be at- " tainted, convicted, or otherwiſe diſcharged of ſuch prin- " cipal felony; who thereupon ſhall make ſufficient certi- " ficate thereof in writing under their ſeal or ſeals to the " ſaid juſtices; after which the juſtices of gaol delivery or " of oyer and terminer or other there authorized ſhall pro- " ceed upon every ſuch acceſſary in the county where he " became acceſſary, in ſuch manner and form as if both " the ſaid principal offence and acceſſary had been commit- " ted in the ſaid county where the offence of acceſſary was " committed. And every ſuch acceſſary, &c. ſhall anſwer upon " arraignment, and receive ſuch trial, judgment, order, and " execution, and ſuffer ſuch forfeitures, pains, and penalties " as is uſed in other ſuch caſes of felony."

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See further title Proſecution by Indictment—(Trial-County).

§ 130. *In Wales.*

4. By the ſtat. 26 H. 8. c. 6. murders and other felonies committed in Wales may be inquired of and tried upon an indictment " in the next adjoining Engliſh county where the king's writ runneth," which has been always conſtrued to mean Salop and not Cheſter, as is elſewhere ſhewn more particularly, in conſidering the general conſtruction upon this and other ſimilar ſtatutes. Appeals however muſt ſtill be brought in the proper county.

26 H. 8. c. 6. ſ. 6. *vide* more at large under the general title *Proſecution by Indictment*—(Trial—County).

1 Hale, 156, 7.
2 Hale, 38.
1 Hawk. ch. 31. ſ. 14.

But ſuppoſing the ſtroke given in an Engliſh county, and the death in Wales, there ſeems to be ſome difficulty in aſcertaining where the trial ſhall be. For though I ſee no reaſon to doubt but that the ſtat. 2 & 3 Ed. 6. c. 24. ſpeaking of " the counties of *this realm*," muſt neceſſarily include Wales, even without the aid of the 20 Geo. 2. hereafter mentioned; yet the ſtat. 26 H. 8. is not according to the literal terms of it ſo plainly calculated to meet this caſe; for that ſtatute only provides for murder and felonies done

Stroke in Engliſh county and death in Wales, or vice verſa.

Ante, f. 128.

1 Hale, 158.
2 Roll. Rep. 28.

or

Ch. V. § 120 *Stroke in Engliſh county and death in Wales, or vice verſa.*

or committed in Wales; and by the ſuppoſition of the ſtatute itſelf of Ed. 6. it could not be ſaid that a murder could be committed in Wales unleſs both the ſtroke and death were there. The two ſubſequent ſtatutes of Geo. 2. taken together, leave this queſtion as it ſtood before. Of the

Poſt. 366.

ſtat. 2 Geo. 2. c. 21. it is ſufficient for the preſent to obſerve, that it provides for caſes where either the ſtroke or the death alone happen in *that part of Great Britain called England*. According to a literal conſtruction of this ſtatute ſtanding alone or with reference to antecedent ſtatutes in pari materia, it might be preſumed that where the ſtroke was in an Engliſh county and the death in Wales, the trial of the offender was intended to be had in the former. But by the ſtat. 20 Geo. 2. c. 42. ſ. 3. (*a*) it is enacted *and declared*, "that in *all* caſes where *the kingdom of England* "or *that part of Great Britain called England, hath* "*been*, or *ſhall be* mentioned in *any* act of parliament, "the ſame *has been* and *ſhall* from henceforth be deemed "and taken to comprehend and include the dominion of "Wales and town of Berwick-upon-Tweed." It muſt therefore be taken in general that the mention of *England* in any act of parliament includes *Wales*; with this reſervation only, that the contrary is not apparent from the ſubject matter as in the above ſtat. of Hen. 8. (*b*). The queſtion then reverts to the mutual operation of the ſtatutes of H. 8. and Ed. 6. upon each other. On the one hand it may be ſaid that the ſtat. of H. 8. proceeding merely upon the ſuppoſition that an impartial trial before the grand ſeſſions could not be inſured in all caſes where the fact itſelf was committed in Wales; yet if the ſtroke were in an Engliſh county, and the death only happened in Wales, a Welch jury muſt be as indifferent as any other upon the trial of the offender: and that that ſtatute being in derogation of the common law ought not to be extended beyond the ſtrict letter of it to include caſes probably not within the view of the legiſlature at the time. On the other hand, if the true

2 Hale, 157.

(*a*) It is worthy of remark that this clauſe, ſo general and extenſive in its operation, ſhould be found in an act of parliament with the following title, "An "act to enforce the execution of an act of this preſent ſeſſion for granting to his "majeſty ſeveral rates and duties on houſes, windows, and lights."

(*b*) *Wales* is there contraſted with *the ſhires of England*.

object

Ch. V. § 130. *Stroke in Engliſh county and death in Wales, or vice verſa.*

object of the ſtat. of H. 8. be conſidered, and the ſtat. of Ed. 6. be compared therewith, as made in pari materia, it ſeems to lead to a different conſtruction. The ſtat. of H. 8. had in view to ſecure the impartial adminiſtration of criminal juſtice, which the experience of the times had ſhewn could not be certainly attained before the ordinary tribunals. It gave an option, therefore, to the parties concerned in caſes of felony to ſubſtitute the trial before an Engliſh judge and jury in place of the ordinary one before the grand ſeſſions. The ſtat. of Ed. 6. created no new felony, but merely removed the difficulty which was ſuppoſed to exiſt in the trial of murder where the ſtroke was in one county and the death in another. The legal effect of it is to provide that ſo far as concerns the trial of murder the offence ſhall be conſidered as committed in the county where the party dies: the trial there, ſays the legiſlature, ſhall be as good and effectual *as if the ſtroke or poiſoning had been committed and done in the ſame county where the party ſhall die.* Therefore if the death be in a Welch county; and for the purpoſe of trial the ſtroke is to be conſidered as given in the ſame county; then the ſtat. of H. 8. attaches, the ſole object of which in this reſpect was to give an option to remove ſuch trials as would otherwiſe be had in Wales into the next adjoining Engliſh county: ſuch muſt have been the obvious conſtruction if the two proviſions had been contained in the ſame act; and the two ſtatutes being ſo far in pari materia, and the one not profeſſing to be a repeal of the other, they muſt be made to ſtand together if poſſible, and have a relative conſtruction put upon them. On the other hand, by the ſame rule of conſtruction, if the ſtroke be in Wales and the death in any Engliſh county, the trial muſt be in ſuch Engliſh county, according to the ſtatute of Ed. 6., the ſtat. of H. 8. not attaching in that caſe.

(*Vide* 1 Hale, 157. as to the Grand Seſſions.)

§ 131. *Stroke or death at ſea or out of England.*

5. Where the ſtroke is at ſea or out of England, and the death in a county, or vice verſâ.

3 Inſt. 48. 1 Hale, 426. 2 Hale, 163. 1 Hawk. ch. 31. ſ. 11, 12. *Vide* ante, ſ. 128.

It ſeems to have been a matter of great doubt, whether the killing of one who died at land of a wound received at ſea could be inquired of by the common law; (certainly not at leaſt by the ordinary commiſſion of oyer and terminer within

Ch. V. § 131. *Stroke or death at ſea or out of England.*

within a county;) becauſe, though the place where the ſtroke was given might pertain to the realm of England, yet not being within the body of any county, no venire could come from thence: neither could the admiral inquire of it, becauſe the death happened out of his juriſdiction. And for the ſame reaſon it could not be determined by ſpecial commiſſioners under the ſtat 27 H. 8. c. 4. or 28 H. 8. c. 15.; they being confined to inquire of murders at ſea: nor, as Lord Hale ſays, by the conſtable and marſhal, which was the opinion of Lord Coke founded on the ſtat. 13 Ric. 2. ſtat. 2. But according to Lord Hale it might be determined in B. R. ſitting in the county where the party died, or by a ſpecial commiſſion of oyer and terminer, the nature of which he explains in another place. Theſe methods of proceeding had however fallen into diſuſe ſo long ago at leaſt as the end of Edward the third's reign; and the only juriſdiction to which we can with any certainty now refer in this reſpect, till a very late period, is the commiſſion authoriſed by the ſtat. 33 H. 8. c. 23. hereafter mentioned, which under the requiſites there ſet forth might be conſidered as extending to this caſe: but that only related to the principal offenders, and did not extend to acceſſaries.

2 Hale, 20. 3 Inſt. 48. Poſt. f. 132.

Vide 2 Hale, 12, —15.

Poſt. f. 133. 2 Hale, 22.

1 Hawk. ch. 31. § 11.

But for preventing any failure of juſtice, and for taking away all doubts touching the trial of murders in the caſes hereinafter mentioned, it is enacted by ſtat. 2 Geo. 2. c. 21. " that where any perſon ſhall be feloniouſly ſtricken or poi-
" ſoned upon the ſea, or at any place out of that part of
" Great Britain called England, and ſhall die of the ſame
" ſtroke or poiſoning within that part of Great Britain
" called England; or where any perſon ſhall be feloniouſly
" ſtricken or poiſoned at any place within that part of Great
" Britain called England, and ſhall die of the ſame ſtroke
" or poiſoning upon the ſea, or at any place out of that part
" of Great Britain called England, in either of the ſaid caſes
" an indictment thereof found by the jurors of the county
" in that part of Great Britain called England in which ſuch
" death, ſtroke, or poiſoning ſhall happen reſpectively as
" aforeſaid, whether it ſhall be found before the coroner
" upon the view of ſuch dead body, or before the juſtices of
" the peace or other juſtices or commiſſioners who ſhall have
" authority

2 Geo. 2. c. 21.

" authority to inquire of murders, ſhall be as good and ef- Ch. V. § 131.
" fectual in law as well againſt the principals as the acceſſa- *Stroke or death at ſea or out of England.*
" ries, as if ſuch felonious ſtroke and death, or poiſoning
" and death thereby enſuing, and the offence of ſuch ac-
" ceſſaries, had happened in the ſame county where ſuch
" indictment ſhall be found: and that the juſtices of gaol
" delivery and oyer and terminer in the ſame county where
" ſuch indictment ſhall be found, and alſo any ſuperior
" court in caſe ſuch indictment ſhall be removed, &c. ſhall
" and may proceed upon the ſame in all points, &c. as they
" might or ought to do in caſe ſuch felonies, ſtroke and
" death, or poiſoning and death, and the offence of ſuch
" acceſſaries had happened in the ſame county where ſuch
" indictment ſhall be found. And every ſuch offender ſhall
" anſwer upon their arraignments, and have the like de-
" fences, advantages, and exceptions, (except challenges for
" the hundred,) and ſhall receive the like trial, judgment,
" order, and execution, &c. as if their (reſpective) offences had
" happened in the ſame county where ſuch indictment
" ſhall be found."

Where one ſtanding on the ſhore ſhot at another ſtanding in the ſea, who afterwards died on board a ſhip, all the judges held that the trial muſt be in the Admiralty court, and not at common law. Coombe's caſe, 20th Jan. 1786, MS. Buller J. Leach. 302. laſt edit. 432. S. C.

6. Where both the ſtroke and death are at ſea, or in havens, &c. § 132. *Stroke and death at ſea.*

By ſtat. 28 H. 8. c. 15. it is enacted, " that all treaſons, 28 Hen. 8. c. 15.
" felonies, murders, &c. committed upon the ſea, or in
" any other haven, river, creek, or place where the admiral
" has or pretends to have power, authority, or juriſdiction,
" ſhall be inquired, tried, heard, determined, and judged
" in ſuch ſhires and places in the realm as ſhall be limited
" by the king's commiſſion or commiſſions to be directed
" for the ſame, in like form and condition as if any ſuch
" offence had been committed upon the land. And ſuch
" commiſſions ſhall be under the king's great ſeal directed
" to the admiral or his deputies, &c. and to three or four
" ſuch other ſubſtantial perſons as ſhall be appointed by the
" Lord Chancellor to hear and determine ſuch offences after
" the

Ch. V. § 132. *Stroke and death at ſea, &c.*

" the common courſe of the laws of this realm uſed for " treaſons, felonies, murders, &c. committed upon the land " within this realm."

Vide title Piracy.

As to the particular manner of proceeding under this ſtatute, and the extent of the admiralty juriſdiction, they will be conſidered when I come to treat of piracy and other offences committed at ſea triable under the ſpecial commiſſion founded thereon. It will ſuffice here to obſerve, that the

15 Ric. 2. c. 3. 4 Inſt. 137.

ſtatute 15 Rich. 2. c. 3. gives the admiral juriſdiction to inquire " of the death of a man, and of a maihem done in " great ſhips hovering in the main ſtream of great rivers, " only beneath the bridges of the ſame rivers nigh to the " ſea, and in none other places of the ſame rivers." But this, ſo far as it extends to give the admiral juriſdiction within the bodies of counties, muſt be taken very ſtrictly;

1 Hale, 16. 54.

for according to Lord Hale it extends only to rivers that are arms of the ſea, namely, that flow and re-flow and bear great ſhips; and as he inclines to think, only to ſuch deaths and mayhems as happen in thoſe great ſhips. This juriſdiction however is only concurrent with, and not in excluſion of the common law; for the ſame author ſays, the coroner of the county may inquire in any great river upon theſe articles, *where a man can ſee from one ſide to the other*: or as Hawkins

2 Hawk. ch. 9. ſ. 14.

ſays, *where a man ſtanding on one ſide may ſee what is done on the other.*

2 Hale, 54.

The inquiſitions taken before the coroner of the Admiralty are returned before the commiſſioners under the 28 H. 8. c. 15. Thoſe before the coroner of the county are to be returned before commiſſioners of gaol delivery for the county.

39 Geo. 3. c. 37. Ante, ſ. 4.

Offenders may now be found guilty of manſlaughter before commiſſioners under the ſtat. of H. 8.

§ 133. *Stroke and death in foreign parts.* 3 Inſt. 48. 2 Hawk. ch. 31. ſ. 12.

7. In regard to homicide committed in foreign parts, Lord Coke ſays, that if two of the king's ſubjects go over into a foreign realm and fight there, and the one kill the other, this may be heard and determined before the conſtable and marſhal; relying principally on the ſtat. 13 Ric. 2. c. 2. which ſays, that " to the conſtable it pertaineth to " have conuſance of contracts concerning deeds of arms or

" of

" of war out of the realm, &c. which cannot be determined " or diſcuſſed by the common law." But this ſeems always to have been a doubtful conſtruction of that ſtatute, and may probably be denied at this day when that juriſdiction has fallen into diſuſe. The ſame may be ſaid of the ſtatute 1 H. 4. c. 14. which ſays, that all appeals for things done out of the realm ſhall be heard and determined before the ſame juriſdiction. But by ſtat. 33 H. 8. c. 23. (which with reſpect to the trial of murder ſtands unrepealed by the ſtat. 1 & 2 Ph. & M. c. 10.) it is enacted, " that if any perſon " being examined before the king's counſel, or three of " them, upon any treaſons, miſpriſions of treaſons, or mur- " ders, do confeſs the ſame, or are vehemently ſuſpected " thereof by the ſaid council upon ſuch examination, the " Lord Chancellor, by the king's command, ſhall ſend a " commiſſion of oyer and terminer under the great ſeal to " ſuch perſons and into ſuch ſhires or places as ſhall be " named and appointed for the ſpeedy trial of ſuch offenders; " which commiſſioners ſhall have power and authority to " inquire, hear, and determine all ſuch offences within the " ſhires and places limited by their commiſſion by a jury " returned by the ſheriff, &c. in whatever other ſhire or " place *within the king's dominions or without* ſuch offences " ſo examined were committed." " And no challenge for " the ſhire or hundred (but for want of freehold) ſhall be " allowed."

Ch. V. § 133. *Stroke and death in foreign parts.*

Vide ante, f. 131.

33 Hen. 8. c 23. 1 Hale, 283. 374. 2 Hale, 22. 164. 3 Inſt. 27.

(Repealed as to treaſons by 1 & 2 Ph. & M. c. 10.)

This ſtatute extends not to acceſſaries.

1 Hawk. ch. 31. ſ. 11. 1 MS. Sum. 54.

There does not appear to have been much uſe made of this ſtatute. One inſtance is to be found of a proceeding under it for a murder committed in England, in the caſe of Ludowick Grevil (*a*), where the judges reſolved that he being charged as *acceſſary*, his caſe was not within the act, acceſſaries not being named. In another inſtance Edward Ealing was indicted for the murder of Charles Bignell at the Dollars in the kingdom of Sweden in partibus tranſmarinis extra Angliam. The precepts for the return of the grand inqueſt and jury for the trial of the iſſue recite the commiſſion of the ſeſſions of oyer and terminer " ad inquirendum

Ludowick Grevil's caſe, 1 And. 194. temp. Eliz.

Rex v. Ealing or Ely, O. B. Dec. 1720. Ex relatione Foſter J. Serjt. Forſter's MS 1 MS. Sum. 54 cites Ld. King's MS 300. *Vide* 8 Mod. 144.

(*a*) See this caſe differently and as it appears incorrectly reported in Crompt. Juſt. 22. cited in 1 Hale, 283. and 2 Hale, 22.

Ch. V. § 133. *Stroke and death in foreign parts.*

" per ſacramentum bonorum et legalium hominum civitatis " London de quibuſcunque proditionibus, miſpriſionibus " proditionum, et murdris extra Angliam ubicunque perpe- " trat. ſecundum actum parliamenti domini Henrici octavi " predict. 33. et ad eaſdem proditiones et alia premiſſa (hac " vice) audiend. et terminand." It was inſiſted by Ealing's counſel before King Ch. J., Eyre Ch. B., and Baron Montague, that the ſtat. 38 H. 8. extended only to murders committed in England; that ſo a murder in one ſhire may by that act be tried in any other ſhire, but not to murders committed out of the realm. But the court reſolved that it did extend to murders committed out of the realm: and indeed the ſtatute is clear as to that point. And they ſaid, that a like commiſſion had been granted in the late queen's time in the caſe of one Chambers, indicted at the Old Bailey June 1709, for a murder committed extra regnum Angliæ ſſ. apud Barcelona in regno Hiſpaniæ. The court then proceeded to try Ealing, who was convicted and executed (*a*).

Vide 8 Mod. 144. S. C. mentioned.

10 & 11 W. 3. c. 25. ſ. 13. In Newfoundland, &c. *Vide* tit. Piracy.

By ſtat. 10 & 11 W. 3. c. 25. ſ. 13. murder and all other capital crimes in Newfoundland and the iſles thereto belonging are triable in any county here. Since when the acts of the 32 Geo. 3. c. 46. and 33 Geo. 3. c. 76. have enabled his majeſty to erect courts of civil and criminal juriſdiction there, which are " to hold plea of all crimes and miſde- " meanors committed within the iſland of Newfoundland, " and on the iſlands and ſeas to which ſhips or veſſels repair " from the iſland of Newfoundland for carrying on the fiſh- " ery, and on the banks of Newfoundland, in the ſame " manner as plea is holden of ſuch crimes and miſdemean- " ors in England." Theſe acts are continued by the 34 Geo. 3. c. 44. and 35 Geo. 3. c. 25. But nothing appears therein to ſhew that the juriſdiction under the ſtatute of King William is taken away.

(*a*) Jacob's Law Dict. tit. Homicide, ſ. 5. mentions another inſtance of a commiſſion iſſued againſt Capt. Rocke for killing Mr. Ferguſon at the Cape of Good Hope; but no time is mentioned.

II. *Arraign-*

II. *Arraignment.*

Ch. V. § 134.

If there be an indictment for murder, and the coroner's inquiſition againſt the ſame perſon at the ſame ſeſſions of gaol delivery for the ſame offence, the practice is to arraign and try the priſoner upon both, in order to avoid the plea of auterfoits acquit; or attaint; and to indorſe his acquittal or attainder upon both preſentments.

§ 134. *Arraignment.*

§ 135. *Manner of taking and conſtruing verdict.* 1 Hale, 449. 2 Hale, 302. 2 Hawk. ch. 47. ſ. 8. Plow 101. Ante ad incipium, and ſ. 13. Radburne's caſe, ante, p. 339. 356. Ante, ſ. 118. 1 Hale, 449, 450. 2 Hawk. ch. 23. ſ. 95.

Upon every indictment for petit treaſon or murder, the jury may negative the higher offence, and find their verdict for any leſſer ſpecies of homicide; the ſeveral degrees of which I firſt had occaſion to conſider. It has alſo been ſhewn in what caſes they may properly find a general verdict of *not guilty*; or find the ſpecial matter, and leave the party to ſue out his pardon under the ſtatute of Glouceſter, c. 9. And the ſame rule holds in the caſe of indictments framed on the ſtatute of ſtabbing. So in appeals, the defendant in an appeal of murder may be found guilty of manſlaughter only; and the appellant in that caſe ſhall not be nonſuited. And though it were formerly conſidered to be optional in the jury upon an appeal of murder, if the caſe appeared to be only manſlaughter, to find accordingly, or to acquit the defendant altogether, yet it is now ſettled that they muſt find the manſlaughter.

Guilty in different degrees. Ante, ſ. 58. 82. 1 Hale, 438. 446. 2 Hawk. ch. 29. ſ. 7. 15. Ld. Mohun's caſe, Dom. Proc. 1692. 4 St. Tr. 541.

Again, ſeveral perſons preſent at a homicide committed may be guilty in different degrees. Thus one who joins in an affray on a ſudden may be only guilty of manſlaughter, though he gave the ſtroke; while another who abetted him, being before deliberately engaged in the affray, upon malice, may be guilty of murder. Alſo a wife or ſervant may be guilty of petit treaſon and a ſtranger of murder, being all preſent at the fact. So one may be guilty only of a treſpaſs and aſſault; while another perſon preſent may be guilty of felony in maiming by lying in wait. In ſuch caſe the former, if indicted for the felony, is entitled to a general acquittal.

Vide tit. Mayhem.

Special finding. Mackally's caſe, 9 Co. 69. Holloway's caſe, Pal. n. 548.

If the jury find the ſpecial matter from whence the law preſumes malice, though they do not expreſsly find the malice in fact, yet judgment of death muſt be given thereon. So though they do not find that the ſtroke was felonious.

Ch. V. § 135. *Commitment and bail.*

The ſtat. 3 H. 7. c. 1. empowers the court before whom one is acquitted upon an indictment for murder, either as principal or acceſſary, to commit or bail him until the year and day after the fact committed, that in caſe an appeal be brought, he may be forthcoming. But this extends not to perſons found guilty of manſlaughter or ſe defendendo, or homicide by miſchance, nor to ſuch as plead the king's pardon.

3 H. 7. c. 1. Kel. 25. *Vide* 5 & 6 W. & M. c. 13. Chetwynd's caſe, B. R. H. 17 G. 2. 2 Str. 1203.

§ 136. *Form of judgment. Petit Treaſon.*

The judgment in petit treaſon is the ſame as in the lower ſpecies of treaſon before conſidered, namely, to be drawn (on a hurdle) and hanged until dead. It was formerly different in the caſe of women, who were adjudged to be drawn and burned; but this was altered by the ſtat. 30 Geo. 3. c. 48. by which they are ſubjected to the ſame judgment in all reſpects as men, and particularly with reſpect to the proviſions of the ſtat. 25 Geo. 2. c. 37.

Vide ante, p. 137. 3 Inſt. 211. 1 Hale, 382. n. 2 Hale, 399. Foſt. 107. 336. 4 Blac Com. 204.

Murder.

The judgment in murder was the ſame as in other caſes of capital felony, namely, to be hanged by the neck until dead. But by the ſtat. 25 Geo. 2. c. 37. in order to ſtigmatize and deter perſons from the commiſſion of this heinous offence, it is enacted, "that all perſons who ſhall be found "guilty of wilful murder be executed according to law, "on the day next but one after ſentence paſſed; (unleſs it "happen to be Sunday, and then on the Monday following)." And (by ſ. 2.) "The body of ſuch murderer ſo convicted "ſhall, if ſuch conviction and execution ſhall be in the "county of Middleſex, or within the city or liberties of "London, be immediately conveyed by the ſheriff, &c. to "the hall of the Surgeon's Company, or ſuch other place "as the ſaid company ſhall appoint for this purpoſe, and "be delivered to ſuch perſon as the ſaid company ſhall appoint, who ſhall give the ſheriff, &c. a receipt for the ſame: "and the body ſo delivered ſhall be diſſected and anatomized by the ſaid ſurgeons, &c. And in caſe ſuch conviction and execution ſhall be in any other county or "place in Great Britain, then the judge or juſtice of aſſize "or other proper judge, ſhall award the ſentence to be "put in execution the next day but one after ſuch conviction (except as aforeſaid); and the body of ſuch murderer

25 G. 2. c. 37. s. 1.

" derer ſhall in like manner be delivered by the ſheriff to " ſuch ſurgeon as ſuch judge or juſtice ſhall direct for the " purpoſe aforeſaid." And (by ſ. 3.) " the ſentence ſhall " be pronounced in open court immediately after the " conviction of ſuch murderer, unleſs the court ſhall ſee " reaſonable cauſe for poſtponing the ſame. In which " ſentence ſhall be expreſſed, not only the uſual judgment " of death, but alſo the time appointed thereby for the exe- " tion thereof, and the marks of infamy directed for ſuch " offenders." Ch. V. § 136. *Form of Judgment in murder.*

Sect. 4. enables the judge for reaſonable cauſe to ſtay execution; " regard being always had to the true intent and " purpoſe of this act." By ſ. 6. " ſuch judge or juſtice " may appoint the body of any ſuch criminal to be hung " in chains. But in no caſe whatever the body of any " murderer ſhall be ſuffered to be buried, unleſs after ſuch " body ſhall have been diſſected and anatomized as afore- " ſaid. And ſuch judge or juſtice ſhall, and he is hereby " required to direct the ſame either to be diſpoſed of as " aforeſaid, to be anatomized, or to be hung in chains, in " the ſame manner as is now practiſed," &c. *Stay of execution.* 4 Blac. Com. 402.

At a meeting of the judges in June 1752, to conſider of this law, in the caſe of Swan and Jefferys, they agreed that this ſhould be the ſentence or judgment:— Serjt. Forſter's MS. ex relatione Clive J. Foſt. C. L. 1

" That you be taken from hence to the priſon from " whence you came, and that you be taken from thence on " the day of inſtant (or next) to the place of " execution, and that you be there hanged by the neck till " your body be dead; and that your body when dead be " taken down, and be diſſected and anatomized." They alſo reſolved that the judgment for diſſecting and anatomizing, and touching the time of execution, ought to be pronounced in caſes of petit treaſon, though murder only is mentioned, and in that caſe too the time of execution to be a part of the judgment.

There was ſome doubt whether either judgment of diſſection or hanging in chains might not be given; and if the firſt were pronounced, whether if no ſurgeon would take the body it might not be hung in chains. But on debate

Ch. V. § 136. *Form of Judgment in murder.*

it was agreed by nine judges, that in all cases within the act the judgment for dissecting and anatomizing *only* should be part of the judgment pronounced; and if it were thought advisable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the proviso for that purpose in the statute: and so is the practice.

Ld. Ferrers' case, Dom. Proc. 1760. Foft. 138.

This statute extends to peers convicted in parliament.

Should the day appointed by the judgment for the execution lapse before such execution done, a new time may be appointed (in the case of a peer) either by the high court of parliament, before which such peer shall have been attainted; or by B. R., the parliament not then sitting; the record of attainder being properly removed into B. R.

Regulations for treatment of murderers.

By s. 6. of the abovementioned statute, a murderer after conviction is directed to be confined in a separate cell, and that no person but the gaoler or his servants shall have access to him, without licence under the hand of the judge or sheriff. But in case the judge shall stay execution he may relax these restraints by licence in writing signed by him. By s. 8. the convict shall between sentence and execution be fed with bread and water only (except on receiving the sacrament, or necessaries administered medicinally by a professional man) under a penalty upon the gaoler of 20 l. and imprisonment till it be paid, and forfeiture of his office. By s. 9. "if any person shall rescue or attempt to "rescue any person out of prison, committed for or found "guilty of murder; or rescue or attempt to rescue any "person convicted of murder going to execution, or during "execution, every such offender shall be deemed guilty "of felony, and suffer death without benefit of clergy."

Rescuers before execution.

After execution.

And by s. 10. "If any person shall after such execution "rescue or attempt to rescue the body of such offender out "of the custody of the sheriff or his officers, during the "conveyance of such body to any of the places directed by "this act, or from the Company of Surgeons, &c. or from "the house of any surgeon where the same shall have been "deposited in pursuance of this act, he shall be deemed "guilty of felony, and be liable to be transported for seven "years

" years, &c. and be ſubject to the like puniſhment and " methods of conviction in caſe of returning into or being " found at large within Great Britain within the ſaid term " of ſeven years, in all reſpects as by law other felons are " ſubject to in caſe of unlawfully returning from tranſport- " ation."

Ch. V. § 136. *Reſcue of the body, &c.*

The judgment in caſes of manſlaughter and other leſs degrees of homicide have been before mentioned.

In manſlaughter. Ante, ſ. 4, 5, &c.

CHAP. VI.

Of the reſpective Duties of the Vill, the Coroner, and others, upon a Homicide committed.

1. *As to the Duty of the Vill, Hundred, Conſtable, &c.*
Perſons, preſent at the Fact omitting to arreſt Offender, or give Notice, or raiſe Hue and Cry, indictable. § 1.
Conſtable, Vill, Hundred, &c. anſwerable for like Omiſſion, or Eſcape of Offender. *ib.*
Or for not giving due Notice to Coroner before the Body be buried. - - - - § 2.
Who liable for negligent Eſcape, after Caption. § 3.
2. *As to the Duty of the Coroner.* - - § 4.
How puniſhable for Neglect. *ib.*
Inquiſition to be *ſuper viſum Corporis.* ib.
Where the Body cannot be found, Inquiſition to be by Juſtices, &c. - - - § 5.
Of what and how the Coroner is to inquire by ſtat. 4 Ed. 1. ſt. 2. - - - § 6.
Not of Acceſſaries after. *ib.*
Upon whom and on what Occaſions the Inquiſition ought to be taken: Not vexatiouſly, or unneceſſarily, or by way of Extortion. - - § 7.
Puniſhment of Coroner extorting Money to omit taking Inquiſition. *ib.*
Manner and Form of the Inquiſition. - § 8.
Inquiſition by one of ſeveral Coroners good; but not by Deputy. *ib.*
Evidence to be heard for the Party accuſed as well as for the Crown. - - - § 9.
By ſtat. 1 & 2 Ph. & M. c. 13. Effect of Evidence to be put in Writing, and certified to the next Aſſizes, and Witneſſes bound over. *ib.*
Puniſhment of Coroner for Miſbehaviour. § 10.

The

The ſeveral Sorts of Inquiſition. - § 11.
1. Finding the Death *by the Viſitation of God.* - *ib.*
2. *By an inanimate or irrational Thing.* - § 12.
Deodands. What are ſuch. - § 13.
How the Value to be aſſeſſed. Relation of Forfeiture. *ib.*
3. *By the Act of the Deceaſed.* - - § 14.
Relation of Forfeiture of Felo de ſe. *ib.*
Form of ſuch Inquiſition. - - § 15.
How far traverſable. - - § 16.
Evidence of Inſanity. - - § 17.
4. *By the Act of another.* - - § 18.
Who to be bound over. *ib.*
Jury may find the Fact done by one not charged. *ib.*
Preſentment of Flight, how far traverſable. § 19.
Fees of Coroner. - - - - § 20.

Touching the Arreſt of Offenders on Homicide committed.

§ 1. *Arreſt of offenders on homicide committed.*

IT may not be deemed unneceſſary, in addition to what has been already ſaid upon the ſubject of Homicide, to take a ſhort review of thoſe proviſions which the law has made for the furtherance of juſtice in this reſpect. In no inſtance has greater care been taken for the ſpeedy detection and puniſhment of the guilty.

And firſt concerning the ſteps neceſſary to be taken upon the fact of an homicide committed:

If any private perſon of full age be preſent when a murder or manſlaughter is committed, or dangerous wound given, and do not his beſt endeavour to apprehend the malefactor, and raiſe the hue and cry, he ſhall be fined and impriſoned. The conſtable or other head officer of the town or vill ought alſo to be made acquainted with the fame by thoſe to whom knowledge of the fact firſt comes, that he may uſe all due diligence for the apprehenſion of the offender, and raiſe hue and cry: for the neglect of which he is in like manner puniſhable: and particularly in default of raiſing the hue

1 Hale, 448. 2 Hale, 75, 6. 2 Hawk. ch. 12. ſ. 1. 4. Wilburn's caſe, Noy. 50. 4 Ed. 1. ſt. 2. *Duty of conſtables, &c. on notice.*

Ch. VI. § 1. *Arreſt of perſons preſent.*

hue and cry he ſhall forfeit 5l. by ſt. 8 Geo. 2. c. 16. ſ. 11. to be recovered by ſuit or information within ſix months after.

Duty of vill, &c.
1 Hale, 448. 604.
2 Hale, 73.
2 Hawk. ch. 12. ſ. 2, 3.
3 H. 7. c. 1.
Kel. 5.

Again, if any ſuch offence be committed in an incloſed town, either by day or night, or within the precincts of any other town or vill in the day time while day light laſts, and the offender be not taken, the town or vill may be amerced upon a preſentment thereof either by the coroner or grand inqueſt before the juſtices of gaol delivery, or by the juſtices of the peace. And if the vill be not ſufficient to anſwer the amerciament, the hundred ſhall be charged therewith, and, in default of that, the county.

Of hundred and county.

§ 2. *Notice to be given to coroner.*
1 Hale, 424.
2 Hale, 57, 8.
Sum. 170. *Vide* 1 Bac. Abr. tit. Coroner.
2 Hawk ch. 9. ſ. 23. R. v. Clerk. Salk. 377.
7 Mod. 10.
R. v. Solgard.
2 Str. 1095.
Vide poſt. ſ. 7.

In the next place, in all caſes of notice or reaſonable ſuſpicion that a party has come to a violent or unnatural death, the vill, or hundred, or (even in the caſe of the natural death of a priſoner) the gaoler, ought to ſend for the coroner before the body is buried; otherwiſe they ſhall be amerced, on preſentment either by the grand inqueſt, or by the coroner. In like manner any individual is indictable for preventing or withholding the coroner from doing his duty by viewing the body. But if the death, however ſudden, were from fever or other apparent viſitation of God, there is no occaſion (with the exception above-mentioned) to ſend for the coroner.

2 Hale, 57, 8.
Sum. 170.
2 Hawk. ch. 9. ſ. 23.

The vill, &c. is alſo liable to be amerced in the ſame manner if it ſuffer a body that died an unnatural death to remain unburied for an unreaſonable time till it putrify, before they ſend for the coroner.

§ 3. *Liability for eſcapes.*
1 Hale, 489, 490.
2 Hale, 73, 4.

If the offender were taken by the townſhip, and delivered to the ſheriff or his bailiff, or to the gaoler of the county, and then an eſcape happen, the townſhip or vill is not chargeable, but the ſheriff or bailiff. But if he be in the guard of the conſtable carrying him to gaol, even though the gaoler refuſed to take him, and he eſcaped, it is a charge on the vill. Nay, though in the flight he be ſlain for neceſſity of retaking him, becauſe he reſiſted. And if the killing be out of any vill, the hundred is anſwerable for the eſcape in the like manner,

Thus

Thus much of negligent eſcapes; ſuch as are voluntary will fall under a different conſideration in another place.

Vide offences againſt lawful cuſtody.

§ 4.

Duty of coroner.

If the coroner neglect to come in convenient time after notice, he ſhall be fined and impriſoned: to enforce which the ſtat. 1 H. 8. c. 7. directs that he ſhall forfeit 40s. for every ſuch default; concerning which the juſtices of peace and of aſſize have power to inquire. And if he make no inquiſition at all upon a perſon ſlain, or do not return the ſame to the next gaol delivery, he ſhall forfeit 5 l. for every default, by the ſtat. 3 H. 7. c. 1. And if upon a preſentment by the grand inqueſt of a death of which the coroner ought to have taken cognizance, no ſuch preſentment be found in the coroner's roll, he is puniſhable even at common law by fine and impriſonment.

2 Hale, 58. 2 Hawk ch. 9. ſ. 29. 1 H. 8. c. 7. 3 H. 7. c. 1. 2 Hale, 58.

Inquiſition to be made ſuper viſum corporis.

If the body be buried before the coroner come, though he ought to record it, that it may be inquired by whoſe default it ſo happened, yet he ſhould direct it to be taken up, if it may poſſibly be done without danger of infection, in order that the inquiſition may be taken ſuper viſum corporis, without which it is void; and he would be obliged to make a new one upon ſuch view. However, where a body has been ſo long buried that it may reaſonably be preſumed that the view of it could be of no manner of uſe for the information of the jurors, the court into which the coroner's inquiſition is returned will, upon affidavit of the circumſtances, in diſcretion refuſe to receive or file it. And in ſuch caſes, or where the inquiſition has been quaſhed in B. R., the coroner ought not to dig up the body, unleſs he have a ſpecial writ or order from the court for that purpoſe.

1 Hale, 58, 9. 2 Hawk. ch. 9. ſ. 23, 24. 1 Bac. Abr. 753. 1 Str. 22. 167. 533. 2 Lev. 140.

§ 5.

Where the body not found.

Where the body cannot be found, ſo that the coroner, who has authority only ſuper viſum corporis, cannot proceed; or where it would be dangerous or unneceſſary to dig it up; or as it ſeems where the coroner neglects to take any inquiſition, the inquiry may be by juſtices of peace, who by their commiſſion have a general power to inquire of all felonies; or it may be in the King's Bench, if the felony were committed in the county where that court ſits; or by the juſtices of oyer and terminer.

1 Hawk. 27. ſ. 12. 23. 1 Hale, 414. 419. 3 MS. Sum. 312. 3 Inſt. 55. 1 Burr. 17.

What

Ch. VI. § 6.

§ 6. *Of what and how the coroner is to inquire.* 4 Ed. 1. ſt. 2. *Vide* 3 H. 7. c. 1. and other ſtatutes there referred to.

What the general authority of the coroner is, and in what manner it ſhould be exerciſed, may be ſeen in the ſtat. 4 Ed. 1. de officio coronatoris, which enacts "that "the coroner, when commanded by the king's bailiffs or by "honeſt men of the country, ſhall go to the places where "any be ſlain or ſuddenly dead or wounded, and ſhall "forthwith command four of the next towns (*a*) or five or "ſix to appear before him, in ſuch a place; and when they "are come thither, the coroner, upon the oath of them, "ſhall inquire (*b*) if they know where the perſon was ſlain, "whether it were in any houſe, field, bed, town, tavern, "or company, and who were there." "Likewiſe it is to "be inquired who were culpable either of the act or of "the force; and who were preſent, either men or women, "of what age, if they can ſpeak, or have any diſcretion. "And ſuch as are found culpable by inquiſition ſhall be "taken and delivered to the ſheriff, and committed to "gaol; and ſuch as be found, and be not culpable, (i. e. the "witneſſes, and theſe the coroner ſhall bind over by recog-"nizance to the next aſſizes,) ſhall be attached until the "coming of the juſtices, and their names written in the "coroner's roll. If any be ſlain and the body found in "the fields or woods; firſt, it is to be inquired whether "he were ſlain in the ſame place or not; and if it were "brought and laid there, endeavour ſhall be made to follow "their ſteps who brought the body thither; whither brought "upon a horſe or in a cart. Alſo it ſhall be inquired whe-"ther the dead perſon were known or a ſtranger, and "where he lay the night before. And if any be found "culpable of the murder, the coroner ſhall immediately "go into his houſe, and inquire what goods he has, &c. "how much land and the yearly value, and what corn on "the ground, which ſhall be valued and delivered to the "townſhip, which ſhall be anſwerable before the juſtices

(*a*) For this purpoſe the coroner iſſues a precept to the conſtables of ſuch townſhips to return a competent number of jurors, viz. not leſs than 12. 2 Hale, 59. Or he may ſend his precept to the conſtable of the hundred. 3 Mod. Sum. 317. If the conſtable make no return, or the jurors do not appear, their defaults are to be returned, and they ſhall be amerced before the judges of gaol delivery. Ib. and 2 Hale, 62.

(*b*) The jury are ſworn and charged by the coroner to inquire upon view of the body, how the party came by his death. 2 Hale, 60.

"for

" for all; and the land ſhall remain in the king's hands " until the lords of the fee have made fine for it, &c." Ch. VI. § 6. *Of what and how to inquire.*

" Alſo it is to be enquired of thoſe who are drowned or " ſuddenly dead; and after it is to be ſeen of ſuch bodies " whether they were ſo drowned or ſlain, or ſtrangled by " the ſign of a cord tied ſtraight about their necks, or about " any of their members, or upon any other hurt found upon " their bodies: whereupon they ſhall proceed in the form " above ſaid. And if they were not ſlain, then ought the " coroners to attach the finders, and all others in company.

" Upon appeal of wounds and ſuch like, eſpecially if the " wounds be mortal, the parties appealed ſhall be taken " immediately, and kept until it be known perfectly whe- " ther he that is hurt ſhall recover or not; and if he die, " the offenders ſhall be kept: and if the party recover, the " offenders ſhall be attached by four or ſix pledges after, " as the wound is great or ſmall: if it be for a maim, he " ſhall find more than four pledges: and two pledges if it " be for a ſmall wound without mayhem. Alſo all wounds " ought to be viewed; the length, breadth, and depth, and " with what weapons, and in what part of the body the " wound or hurt is, and how many wounds there be, and " who gave them: all which muſt be inrolled by the coroner.

" Moreover if any be appealed, the party appealing of the " fact ſhall be taken, and the party appealed of the force " ſhall be attached alſo, and kept in ward until the parties " appealed of the fact be attainted or delivered.

" Alſo horſes, boats, carts, &c. whereby any are ſlain, " that properly are called deodands, ſhall be valued, and " delivered unto the towns as beforeſaid."

" If any be ſuſpected of the death of any man, being in " danger of life, he ſhall be taken and impriſoned as before " is ſaid."

It is obſervable that this ſtatute being wholly directory and in affirmation of the common law neither reſtrains the power of the coroner, nor excuſes him from any part of his duty not mentioned therein, which was incident to his office before. 2 Hawk. ch. 9. ſ. 21.

The coroner has no authority to inquire of acceſſaries after the fact, as he has of acceſſaries before. 1 Hale, 416. 2 Hale, 63. 2 Hawk. ch. 9. ſ. 26. Moor, 29.

Ch. VI. § 6. *Of what and how to inquire.*

Ch. 5. f. 132.

With reſpect to the line of demarcation between the juriſdiction of the county coroner, and that of the coroner of the admiralty it has been conſidered in the laſt chapter.

§ 7. *Upon whom the inquiſition to be taken.*

1 Hale, 424. 2 Hale, 57, 58. *Vide* 1 Bac. Abr. tit. Coroner.

Firſt the inquiry is to be made "when commanded by the king's bailiffs or by honeſt men of the country" upon ſuch as "be ſlain, or ſuddenly dead or wounded." This power is however to be exerciſed within the limits of a ſound diſcretion. There ought at leaſt to be a reaſonable ſuſpicion that the party came to his death by violent or unnatural means: for if the death, however ſudden, were from fever, or other apparent viſitation of God, there is no occaſion (with the exception before mentioned in caſe of priſoners) for the coroner's interference. And the court of B. R. on two ſeveral occaſions within my own memory blamed the coroners of Norfolk (*a*) and Angleſea (*b*) for holding repeated and unneceſſary inqueſts, for the ſake of enhancing their fees, on bodies and parts of bodies of perſons unknown, which were caſt up by the ſea ſhore, without the ſmalleſt probability or ſuſpicion of the deaths having happened in any other manner than by the unfortunate perils of the ſea.

(*a*) This was upon an application for a mandamus to the juſtices of Norfolk to allow the coroner certain items in his account. M. 33 Geo. 3. MS.

(*b*) The coroner of Angleſea's caſe. E. 40 G. 3.

Rex v. Harriſon. M. 40 G. 3. B. R. MS.

One Harriſon coroner of the county of Cumberland was convicted for extortion in his office, in taking a ſum of money for not holding an inqueſt on the body of a young woman, which he had no authority for doing. On the defendant's being brought up for judgment the circumſtances of the caſe appeared to be that the party had by accident broken her leg, which was afterwards amputated, and after ſome weeks ſhe died in conſequence of the fever attending it, and was buried. Some days after the coroner threatened to have the body taken up and an inquiſition taken on it, unleſs a certain ſum were paid. For which offence the court ſentenced him to pay a fine of 100 l., to be impriſoned for ſix months, and to be amoved from his office. And Mr. Juſtice Groſe in paſſing ſentence ſaid, that the coroner under theſe circumſtances had no pretence or authority for taking any inquiſition at all; but if the caſe had warranted his ſo doing, he was equally criminal in having extorted money to refrain from doing his office.

Next,

Ch. VI. § 8.

§ 8.
Manner and form of inquiſition.

Next, as to the manner of taking the inquiſition; the jurors muſt be at leaſt twelve in number, half of whom in the caſe of a priſoner's dying in gaol ought to be priſoners if there were ſo many, and it ought to appear in every inquiſition at what place or places, and by what jurors by name, it was taken, and that they were ſworn. But it is ſufficient to ſay that it was taken by the oaths of lawful men of the country, without ſtating that they were of the next adjacent towns.

2 Inſt. 148. 2 Hale, 59. 2 Hawk. ch 9. ſ. 22. Pinner's caſe, Cro. Eliz. 31.

Though the inquiſition muſt be taken on the view of the body, yet it is not neceſſary that it ſhould be taken in the very ſame place; but it ſeems that the coroner may adjourn the jury from time to time, and from one place to another; but the real place ſhould be ſtated in the inquiſition.

2 Hawk. ch. 9. ſ. 25. 3 Bulſtr. 173. 1 Bac. Abr. 753.

The inquiſition muſt be on parchment; and ſome have been quaſhed for being on paper (*a*). It muſt be ſigned by all the jury (*b*) as well as the coroner; otherwiſe it is void. And the cuſtom is for the coroner and the jury to ſet their ſeals thereto; but I find no expreſs authority for this.

3 Inſt. 71. Staundf. 51. b. (*a*) Rex v. Beavers and others, B. R. temp. Ld. Mansfield, MS. (*b*) R. v. Js. of Norfolk, M. 33 G. 3. MS. (*a*)

In all reſpects it ſeems that an inquiſition before the coroner for the death of another ought to be as formal and certain as any other indictment.

Cro. Jac. 635.

An inquiſition taken before one of ſeveral coroners ſuper viſum corporis is ſufficient, though all muſt join in an outlawry: but it cannot be done by deputy. But in the caſe of the non-appearance of juries, conſtables, &c. he cannot fine or amerce; but muſt preſent the matter to the next juſtices of gaol delivery, who have power to fine.

1 Hale, 417. 2 Hale, 56. 58. 1 Bac. Abr. 757.

2 Hale, 63.

§ 9.
Evidence.

The coroner's inqueſt muſt hear evidence on oath as well for the party accuſed as for the king, if it be offered to them; becauſe the proceeding is not ſo much an accuſation on an indictment, as an inquiſition of office to inquire truly how the party came to his death: and for an omiſſion in this reſpect an inquiſition of felo de ſe was quaſhed by B. R.

2 Hale, 60, 1, 2. 157. Scorey's caſe, M 22 G. 2. 1 Leach. 50. 2 Sid. 90. 101. 1 Hale, 415.

Depoſitions.

The ſt. 1 & 2 Ph. & M. c. 13. enacts "that every coroner "upon any inquiſition before him found, whereby any

1 & 2 Ph & M. c. 13. ſ. 5.

(*a*) *The inquiſitions that were only ſigned by the coroner and the foreman of the jury.*

"perſon

Ch. VI. § 9. *Evidence on Inquiſition.*

Witneſſes to be bound over by recognizance.

" perſon or perſons ſhall be indicted for murder or man-
" ſlaughter, or as acceſſary or acceſſaries to the ſame before
" the murder, &c. ſhall put in writing the effect of the
" evidence given to the jury before him, being material.
" And as well the juſtices of the peace (two, one
" being of the quorum) as the ſaid coroner ſhall bind
" all ſuch by recognizance or obligation as do declare
" any thing material to prove the ſaid murder, &c.
" to appear at the next general gaol delivery to be
" holden within the county, city, or town corporate
" where the trial thereof ſhall be; then and there to
" give evidence againſt the party ſo indicted at the time
" of the trial; and ſhall certify as well the ſame evidence
" as ſuch bond or bonds in writing as he ſhall take, toge-
" ther with the inquiſition or indictment before him taken
" or found at or before the time of the trial thereof to
" be had."

It is true that the ſtatute does in terms only require the coroner to put in writing *the effect* of the evidence. But this muſt not be taken to give him a latitude, ſuch as hath been but too often taken by perſons of this deſcription to the great perverſion of truth and juſtice, of putting down not the words of the witneſſes but his own conception of their tendency. It is doubtleſs the meaning of the act that the examination of the witneſſes ſhould be taken down with the greateſt poſſible accuracy as to all material points of the inquiry: otherwiſe one great benefit of the act which is to enable the court to compare the examination with the evidence then given muſt be defeated. *The effect* mentioned therein means the true and genuine ſenſe of the evidence as delivered in detail, not indeed in letters, ſyllables, or even words; though theſe ſhould not needleſsly be departed from; but the fair and obvious meaning of the words ſpoken, and not the final reſult of the evidence. Complaints have in my own memory been made by judges on the circuits of the culpable neglect of coroners in this reſpect, and threats of exemplary puniſhment holden out to them to prevent a repetition of the ſame abuſe in future.

I have

Ch. VI. § 10.

I have before noticed the preſentments of the coroner for breaches of duty in others towards him, and by whom the puniſhment ſhall be awarded. In like manner he himſelf is puniſhable for neglect or miſbehaviour in his office in the inſtances before alluded to. But further the ſt. 3 Ed. 1. c. 9. directs that if any coroner &c. for reward, prayer, fear, or affinity, conceal &c. the felonies done in his liberties, or will not arreſt the felons there, or will not do his office for favour to ſuch miſdoers, and be attainted thereof, he ſhall be impriſoned one year, and pay a grievous fine, or if he have not wherewith to pay ſhall be impriſoned three years.

§ 10. *Puniſhment of the coroner.* Ante, ſ. 1. 2 4. 8. 3 Ed. 1. c. 9.

In Lord Buckhurſt's caſe a coroner not returning his inquiſition of murder to the next gaol delivery, but ſuppreſſing it, was diſcharged from his office, and fined 100l. 1 Keb. 280.

Alſo the ſtat. 1 & 2 Ph. & M. c. 13. enacts that "if any coroner or juſtice of the peace ſhall offend in any thing contrary to the true intent and meaning of the ſaid act, the juſtices of gaol delivery of the ſhire, &c. where ſuch offence ſhall happen to be committed, upon due proof thereof by examination before them, ſhall for every ſuch offence ſet ſuch fine on every ſuch juſtice of peace and coroner as they ſhall think meet, and eſtreat the ſame," &c. 1 & 2 Ph. & M. c. 13. ſ. 5. Ante, ſ. 9.

And further by ſt. 25 Geo. 2. c. 29. "If any coroner who is not appointed by virtue of an annual election or nomination, or whoſe office of coroner is not annexed to any other office, ſhall be lawfully convicted of extortion, or wilful neglect of his duty, or miſdemeanor in his office, it ſhall be lawful for the court before whom he ſhall be ſo convicted to adjuge that he be removed from his office." 25 G. 2. c. 29. ſ. 6.

§ 11. *The ſeveral ſorts of inquiſition.*

Having ſaid thus much of the authority of the coroner in general, there remains only to be conſidered the ſeveral ſorts of inquiſitions which may be taken by him touching the death of a perſon. And theſe are either where the death is found to be

1. *By the viſitation of God.*
2. *By means of ſome inanimate or irrational thing.*

Ch. VI. § 11. *The ſeveral ſorts of inquiſition.*

3. *By the party's own act.*
4. *By the act of another.*

By viſitation of God. Ante, f. 7. 1 Hale, 418. 2 Hale, 62.

1. The coroner has no power to take inquiſitions except where the death is ſudden or otherwiſe unnatural; and if the inqueſt find that the party died by the viſitation of God, there is no more to be done; only the inquiſition together with the examinations are by the ſt. 3 H. 7. c. 1. to be returned to the next gaol delivery, or into B. R.

§ 12. *By an inanimate or irrational thing.* 1 Hale, 418. 2 Hale, 62.

2. If the death be found by miſadventure, as by a fall from a cart or the like, the coroner is to take the examination, and return the ſame with the inquiſition to the next gaol delivery; and further to inquire of the deodand, the value thereof, and in whoſe hands it is; and to ſeize and deliver the ſame to the townſhip to be anſwerable for it to the king, by ſtat. 4 Ed. 1. ſt. 2.

2 Hawk. ch. 9. § 28 Allen, 51. 1 Hale, 422. 2 Hale, 62.

But if the deceaſed were killed by a fall from a bridge, by reaſon of its being out of repair, or were drowned in a pit, the townſhip who neglected to repair the one or ſtop up the other, if they were bound ſo to do, ſhall, on inquiſition by the coroner finding ſuch fact, be amerced by the juſtices of gaol delivery.

§ 13. *Deodands.* F. ſt. 265. 1 Hale, 419, 420.

Deodands, ſo called from the former application of them to pious uſes, though now part of the revenues of the crown unleſs granted out, are thoſe forfeited things which moved to or occaſioned the death of a perſon. They are of two ſorts; 1. Such things as moved to the death; 2. Such as, though at reſt, yet were the immediate occaſion of it. Where a perſon is killed by an inſtrument made uſe of for that purpoſe, ſuch inſtrument is forfeited; and that is the reaſon why a value is ſet upon it in the indictment. If a man fall from his horſe and be killed, or in watering his horſe be drowned; if it happened in either caſe from the fault of the animal it is a deodand; otherwiſe not, as was ſolemnly adjudged 5 Ed. 3. and therefore if in the latter caſe the man was drowned by the violence of the ſtream, the horſe is no deodand. If a ſhip or a boat be in freſh water, and a man be killed by a fall therefrom, in ſtrictneſs the ſhip or boat was forfeited, but not the merchandize; though

Fro Jac. 483. 2 Ro Rep. 23. 1 Hale, 422. 1 Hawk. ch. 26. ſ. 6.

though this ſeverity is never practiſed at this day: but if the death happened by any particular merchandize falling on him, that alone was forfeited and not the ſhip; and that rule is now applied in the practice of juries to the ſhip itſelf: the particular part of which immediately conducive to the death is conſidered as a deodand. But the law of deodands does not take place in ſalt water, which includes all arms of the ſea, as far as it flows and reflows, though within the body of a county. Of things at reſt nothing which is part of or fixed to the freehold at the time can be forfeited; and the ſame appears to be now conſidered with reſpect to a bell in a ſteeple or wheel of a mill. And though it is ſaid that a hay rick from whence a man falls and is killed ſhall be a deodand, yet Lord Hale notes that it is not ſo adjudged.

Ch. VI. § 13. *Deodands.*

1 Hale, 422, 3, 4. 1 Hawk. ch. 26. ſ. 6. 1 Hale, 420 421. 1 Hawk. ch. 26. ſ. 5. 1 Lev. 136. Raym. 97. 6 Mod. 187. 1 Sid. 206, 7. 2 Bac. Abr. 293.

This further diſtinction is alſo to be noted, that if an infant under 14 years of age fall from any thing at reſt, it ſhall not forfeited; he not being conſidered of ſufficient diſcretion to take common precautions. But if the thing moved to his death, as an animal, a falling tree, or moving carriage, then it is a deodand. In the latter inſtance both horſes as well as carriage are in ſtrictneſs forfeited: but if the deceaſed fall from the wheel when not in motion, then that only is a deodand.

1 Hale, 420 422.

But theſe forfeitures, being founded on the ſuperſtition of an ignorant age, rather than in principles of reaſon and policy, have for a long time met with but little countenance in Weſtminſter Hall. For when juries have taken upon them to exerciſe a diſcretion, in ſtrictneſs beyond their province, in reducing the quantity of the forfeiture, as in finding the wheel only of a moving carriage as the deodand, and ſetting a ſmall value even on that wheel, (which in fact is the uſual practice,) the court of K. B. have refuſed to interfere on behalf of the lord. They have often interpoſed the authority of the court as the ſovereign coroners in this caſe, and alſo in the caſe of ſuicide, in favour of the ſubject, and to ſave the forfeiture, but never to his prejudice. In the caſe of the King v. Rolfe, coroner of Kent, where the inqueſt found that A. B. ſitting on his waggon accidentally fell to the ground, and that the horſes drawing the waggon

Aſſeſſment of the value. Foſt. 266. 2 Bac. Abr. 294.

R. v. Rolfe, H. 5 G. 2.

Ch. VI. § 13. *Deodands.*

waggon forward one of the fore wheels cruſhed his head, of which he inſtantly died; and then concluded that the wheel only (on which they ſet a ſmall value) moved to his death: Mr. Monpeſſon lord of the franchiſe moved to quaſh the inquiſition, on affidavit that the waggon and horſes were equally inſtrumental in the death; which indeed the finding of the jury ſufficiently implied. But the court were very clear that neither they nor the coroner could oblige the jury to conclude otherwiſe than they had done, and would not ſuffer the affidavit to be read. A like determination took place in the caſe of the King v. Grew, in Michaelmas 29 Geo. 2.

Rex v. Grew, M. 29 G. 2.

Sum. 34. Plowd. 260, &c.

The relation of the forfeiture is to the ſtroke ſo as to avoid all meſne conveyances.

1 Hale, 419. *Ante*, f. 5. *et infra.*

Regularly deodands are to be found by the coroner's inqueſt; but if omitted by him they may be found before commiſſioners of gaol delivery, oyer and terminer, and of the peace.

§ 14. *Inquiſition of Felo de ſe.*

3. If the inqueſt find a man felo de ſe, they ought to find the ſpecial matter, and alſo what goods and chattels he had, and of what value; and ſeize and deliver the ſame to the townſhip to be amenable to the king or the lord of the franchiſe. And without either ſuch an inquiſition by the coroner where the body can be found, or by the juſtices in the caſes before mentioned, there can be no title to the forfeiture.

2 Hale, 61. 1 Hawk. ch. 27. ſ. 9. 1 Hale, 414. 1 Saund. 363. n. by Serjt. Williams. Foſt. 266.

1 Hale, 413. Plowd. 261. 3 Inſt. 55. 1 Bac. Abr. 748. *Vide* Crimes, Felony, Forfeiture.

The forfeiture in this caſe is of goods and chattels only, and not of lands.

With reſpect to the time to which ſuch forfeiture relates, there is a difference of opinion. If one might reaſon from analogy a priori on ſuch a ſubject, it ſhould ſeem that the forfeiture ought to relate to the inquiſition or preſentment, which in this caſe ſupplies the place of a conviction; but the current of authorities refers it to the ſtroke, though Lord Hale combats this opinion in his principal work, and conſiders that it is referable only to the death.

Vide 3 Inſt. 54. 1 Hawk. ch. 27. ſ. 10. Sum. 29. 4 Blac. Com. 190. Plowd. 261, 2. 1 Lev. 8. 1 Hale, 424.

All

Ch. VI. § 15. *Felo de se.*

All inquiſitions of a felo de ſe, being in nature of indictments, ſeem to require the ſame formality and certainty as if they were ſuch. The inquiſition charges that the party feloniouſly and voluntarily killed and murdered himſelf againſt the peace, &c. But inquiſitions of this ſort have been holden good without the concluſion that the party murdered himſelf. And if the inquiſition be full in ſubſtance and only defective in form, the coroner may be ſerved with a rule to amend it; or if the finding of the goods be omitted, that may be ſupplied by a writ of melius inquirendum directed to the ſheriff. But if the inquiſition be not intelligible, or defective in ſubſtance, or if there be great proof of bad practice in the coroner, the court of B. R. will quaſh it on motion, and direct the juſtices of peace to inquire, and that their inquiſition ſhall be traverſed at the then next aſſizes.

§ 15. *Form of inquiſition.*
1 Hawk. ch. 27. ſ. 13.
1 Hale, 412.
1 Salk. 377.
1 Keb. 66.
Vide Saund. 356. note (2) by Mr. Serjt. Williams.
1 Hawk. ch. 27. ſ. 15.
1 Hale, 415.
3 Mod. 101.
Vide 2 Lev. 140. 152. 2 Hawk. ch. 9. ſ. 56.
T. Jones, 198.
1 Ventr. 352.
Ante, ſ. 5.

Next, how far theſe inquiſitions of felo de ſe are concluſive.

§ 16. *Not concluſive.*

It is clear that thoſe taken before the juſtices, or before the ſheriff on a writ of melius inquirendum, may be traverſed: but as to thoſe taken before the coroner upon view of the body Lord Coke thought they were not traverſable. But the reaſons ſuggeſted by Staundford, whom he quotes, are very unſatisfactory: and by the better opinions ſuch inquiſitions are traverſable as well as thoſe before the juſtices. It ſeems indeed very unjuſt that the perſonal repreſentatives of a man ſhould be concluded by an inquiſition which may be taken in their abſence, and that too in the caſe of a forfeiture. The proper courſe ſeems to be for the adminiſtrator to remove the inquiſition into B. R. by certiorari, and to ſuggeſt himſelf aggrieved by it. But it ſeems not to be traverſable, ſo as to make one felo de ſe who is found not to be ſo.

3 Inſt. 55.
Staundf. 183. d.
1 Hale, 414 to 417. 1 Hawk. ch. 27 ſ 11, 12.
2 Hawk ch. 9. ſ. 55. *Vide* Authorities collected by Serjt. Williams, Saund. 362. n. 1.
1 Ventr. 239.

It may not be uſeleſs to obſerve, that this offence of ſuicide can only be committed by one who is of years of diſcretion, and in his ſenſes at the time of the ſtroke. But the excuſe of inſanity ought not to be ſtrained to that length to which it is ſometimes carried by the coroner's juries, namely,

§ 17. *Evidence of inſanity.*
4 Blac. Com. 189.
1 Hale, 412.

Ch VI. § 17. *Felo de se.*

namely, that the very act of ſuicide is an evidence of inſanity; as if every man who acted contrary to reaſon had therefore no reaſon at all. For the ſame argument would prove every other criminal non compos as well as the ſelf-murderer. But this being a caſe of forfeiture, very ſlight evidence of derangement at the time will warrant them in finding that fact. The conſequences of finding one ſelo de ſe have been ſhewn before.

Ante, f. 14.

§ 18. *Death by another.* 2 Hale, 63.

4. If the party be ſlain by another, and the felon be not known, the coroner's inqueſt are to find accordingly; and he ſhall bind over the firſt finder of the body to the next gaol delivery, and return his examinations therewith by ſtat. 1 & 2 Ph. & Mary, c. 13. But if the felon be known, the inqueſt ſhall find him guilty of the death; and alſo inquire of all who were preſent aiding and abetting, and of acceſſaries before, but not after. But though a certain perſon be charged before the coroner, and the jury be directed to inquire particularly as to his guilt, yet if it appear upon examination before them that the perſon accuſed be innocent, and that a ſtranger be guilty, they may find accordingly: and this is not extrajudicial, becauſe the jury were bound to inquire what perſon committed the fact.

1 & 2 Ph. & M. c. 13 ſ. 5. 2 Hale, 63.

3 MS. Sum. 27.

§ 19. *Flight* 2 Hale, 63, 64.

It is alſo their duty to inquire, whether the principal or acceſſaries fled for the homicide; in which caſe the party flying forfeits all his goods and chattels, although afterwards acquitted of the charge; and they ſhall find the value of the goods, and ſeize and commit them to the townſhips as in other caſes.

Ante, f. 12.

Whether traverſable.

Whether the preſentment by the coroner of the flight be traverſable is ſtill more doubtful than that of a felo de ſe. By the current of authorities it ſeems taken for granted that it is not. Yet the reaſons urged by Lord Hale why an inquiſition of felo de ſe may be traverſable ſeem equally applicable to this: nor does he ſeem to be perfectly ſatisfied upon the preſent point: for in another paſſage he ſays it is doubted; and cites Staundford P. C. Lib. 3. c. 21., who makes it a queſtion, and aſſigns as the ſuppoſed reaſon why it is not, that only goods and chattels are thereby forfeited,

Ante, f. 16. 1 Vin. Abr. 755. *Finch* 1 Hale, 46, 17. 2 Hale, 63, 4.

1 Hale, 363.

Ch. VI. § 19. *Inquiſition of death againſt another.*

feited, and de minimis non curat lex; which can hardly be admitted as a ſufficient reaſon at this day. And Hawkins ſays, it is now generally holden at this day that ſuch preſentment may be traverſed. Certainly however the inquiſition before the juſtices finding a flight is traverſable.

2 Hawk. ch. 9. ſ. 54. 1 Bac Abr. 755. & *vide* Saund. 363. note by Serjt. Williams.

§ 20. *Fees.*

By the ſtat. 3 H. 7. c. 1. the coroner was entitled to a fee of 13 s. 4 d. for every inquiſition of homicide taken, payable out of the goods and chattels of the felon or out of the amerciaments on the townſhip in caſe of his eſcape. But by ſtat. 1 H. 8. c. 7. he was to do his office gratis in caſe of homicide by miſadventure, and not by any perſon's hand. In addition to the above, by the ſtat. 25 Geo. 2. c. 29. "for every inquiſition, not taken upon the view of a body dying in gaol or priſon, duly taken within England, by any coroner, in any townſhip or place contributing to the county rates, the ſum of 20 s., and for every mile which he ſhall be compelled to travel from the uſual place of his abode to take ſuch inquiſition the further ſum of 9 d. ſhall be paid him out of the county rates, by order of the juſtices of peace in their quarter ſeſſions. And for every inquiſition taken on the body of one dying in gaol or priſon, a ſum not exceeding 20 s. in the diſcretion of the ſaid juſtices." By ſ. 5. no coroner of the king's houſehold and of the verge, nor any coroner of the Admiralty, or of the county palatine of Durham, or of the city of London and borough of Southwark, nor of any city, &c. liberty or franchiſe (*a*), not contributory to the county rates ſhall be entitled to any fees by this act, but only to ſuch as they were before entitled to.

3 H. 7. c. 1.

1 H. 8. c. 7.

25 G. 2. c. 29. ſ. 1.

(*a*) R. v. The Juſtices of the W. R. of Yorkſhire, 7 Term Rep. 52.

CHAP. VII.

OF MAYHEM, OR FELONIOUS MAIMS.

1. *Of Maims at common Law.* - - § 1.
Such bodily Hurts as render a Man leſs able to defend himſelf or annoy his Adverſary. Felony, puniſhable by Fine and Impriſonment. *ib.*

2. *Of Maims by Statute.* - - - § 2.
5 H. 4. c. 5. 37 H. 8. c. 6.; but principally by 22 & 23 Car. 2. c. 1. called the Coventry Act; whereby certain Injuries malicioufly done to the Tongue, Eye, Noſe, Lip, or any Limb or Member, by lying in wait, are made Felony without Benefit of Clergy. *ib.*

i. What a maiming or disfiguring within the Coventry Act. - - - - § 3.
Slitting of the Noſe. *ib.*

ii. As to the Perſon aimed at. - - § 4.
Maiming one's ſelf a Miſdemeanor at common Law. *ib.*

iii. What a lying in wait. - - § 5.

iv. With what Intent. - - - § 6.
It muſt be to maim or disfigure. *ib.*
But if it were to murder, that is ſufficient. *ib.*

Principals and Acceſſaries. - - § 7.

Indictment and Appeal, Form thereof. - § 8.

Defences. To Mayhem at common Law. - § 9.
1. In defence of the Perſon; but not of Property againſt Treſpaſſer. 2. A Recovery in treſpaſs for the ſame Battery, &c. a Bar in appeal of Mayhem. 3. So Arbitrament, Accord and Satisfaction, Releaſe, Non-ſuit, &c. *ib.*
Defendant cannot plead in abatement to an Appeal, and alſo plead over to the Felony. *ib.*

Trial. By the Court on View, or Jury. - § 10.

Of

Of Mayhem or Maims.

§ 1.
Maims at common law.

A Maim at common law is ſuch a bodily hurt as renders a man leſs able in fighting to defend himſelf or annoy his adverſary: but if the injury be ſuch as diſfigures him only, without diminiſhing his corporal abilities, it does not fall within the crime of mayhem. Upon this diſtinction, the cutting off, diſabling, or weakening a man's hand or finger, or ſtriking out an eye or foretooth, or caſtrating him, or, as Lord Coke adds, breaking his ſkull, are ſaid to be maims; but the cutting off his ear or noſe are not ſuch at common law. But in order to found an indictment or appeal of mayhem the act muſt be done maliciouſly; though it matters not how ſudden the occaſion.

1 MS. Sum. 221. Co. Lit. 126. b. 288. 3 Inſt. 62. 118. Staundf. 38. b. 1 Hawk. ch. 44. ſ. 1, 2. 2 Hawk. ch. 23. ſ. 16. 3 Blac. Com. 121. 4 Blac. Com. 205.

Puniſhment.

All maims are ſaid to be felony; becauſe anciently the offender had judgment of the loſs of the ſame member &c. which he had occaſioned to the ſufferer: but now the only judgment which remains at common law is of fine and impriſonment; from whence the offence ſeems to have been afterwards conſidered more in the nature of an aggravated treſpaſs. Lord Coke accordingly claſſes it as an offence "under all felonies deſerving death, and above all other inferior offences." But particular ſtatutes have extended both the crime and the puniſhment: theſe follow in order of time.

Co. Lit. 127. 1 Hawk. ch. 44. ſ. 3. 2 Hawk. ch. 23 ſ. 18. 4 Blac. Com. 205, 6.

§ 2.
By ſtatute.

By ſtat. 5 H. 4. c. 5. to remedy a miſchief which then prevailed of beating, wounding, impriſoning, or maiming perſons, and after purpoſely "cutting their tongues or putting out their eyes," to prevent them from giving evidence againſt the perpetrators, it is enacted, that "in ſuch caſe "the offenders that ſo cut tongues or put out the eyes of "any, and that duly proved and found that ſuch deed was "done of malice prepenſed, ſhall incur the pain of felony." That is, as Lord Coke explains it, if the act be done voluntarily and of ſet purpoſe, however ſudden the occaſion.

5 H. 4. c. 5. 3 Inſt. 62. Kel. 65.
Cutting tongues or eyes.

By ſtat. 37 H. 8. c. 6. If any perſon "maliciouſly, wil- "lingly, or unlawfully cut or cauſe to be cut off the ear or "ears of any ſubject, otherwiſe than by authority of law, "chance

37 H. 8. c. 6. ſ. 4.
Cutting off ears.

Ch. VII. § 2. By statute

"chance medley, sudden affray, or adventure, he shall not "only forfeit treble damages to the party grieved, to be "recovered by action of trespass, but shall forfeit 10 l. to "the king for every such offence, in the name of a fine."

22 & 23 Car. 2. c. 1. 7. Coventry act. 4 Blac. Com. 207.

But the principal and most severe statute upon this subject is that of the 22 & 23 Car. 2. c. 1. commonly called the Coventry act, from the circumstance of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament. It enacts "that if any person or persons shall, on purpose and "of malice forethought, by laying in wait, unlawfully cut out "or disable the tongue, put out an eye, slit the nose, cut off "a nose or lip, or cut off or disable any limb or member of "any subject; with intention in so doing to maim or disfigure "him in any the manners before mentioned; that then the "person or persons so offending, their counsellors, aiders, "and abettors, knowing of and privy to the offence as afore-"said, shall be declared to be felons, and suffer death as in "cases of felony without benefit of clergy." But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender."

§ 3. Construction of the Coventry act. 1 MS. Sum. 122.

To bring an offender within the Coventry act there must be proof of a deliberate and premeditated design to do a personal injury of the sort described to another; and it must appear that the mischief was done in the manner described therein, that is, on purpose and of malice aforethought, and by lying in wait for that purpose. I shall consider

1. What act of maiming or disfiguring is within the statute.
2. Against whom the offence in general may be committed.
3. What is a lying in wait.
4. With what intent.

Rex v. Carrol and King, O. B. July 1760. 1 MS. Sum. 214. Bookt. Furth. MS. S. C. Leach 53. new edit. 66.

1. It has been made a question what shall be considered as a slitting of the nose within this act. Barney Carrol, and William King were indicted, the one for slitting the nose of Mr. Kerby, a gentleman at the bar, the other for being present,

preſent, aiding, and abetting. The evidence was, that Mr. Kerby, about ten at night in the Strand, detected one Byfield a boy picking his pocket, ſeized him, and was carrying him along the ſtreet. Carrol who was lurking thereabouts came up to them, and after walking for ſome little time, ſometimes before ſometimes after them, ſtruck the proſecutor a violent blow acroſs the face with a large knife, ſaying, "Damn you Sir, let the boy go." The ſurgeon's deſcription of the wound was, "that a knife or ſharp in-"ſtrument had penetrated under the arch of the right eye "near the nerve that ſupports the eye-lid, and endangered "it: that the knife had paſſed *athwart the upper part* "*of the noſe, the fleſh of which was cut or ſlit, and the bone* "*laid bare*, the frontal blood veſſels of the forehead divided; "and that the wound paſſed from the noſe between the "brow and lid of the left eye, and terminated in the left "temple." It appeared from the evidence of ſeveral eminent ſurgeons that the word ſlit was an old ſurgical term, ſynonimous with fiſſure, inciſion, or gaſh. Byfield and Mathews, two boys, depoſed that the priſoners and they had agreed to go out to pick pockets together; the boys were to rob, and if detected or ſeized the priſoners were to ſtab or wound the perſon to reſcue them; and Carrol had agreed that he would either ſtab or cut off the noſe of the firſt man that moleſted them, and actually lay in wait and followed the boys for that purpoſe above two hours and an half before they met Mr. Kerby. This being a *tranſverſe* cut, it was objected on behalf of the priſoners, that this was not properly a *ſlitting* of the noſe; that the ſtat. of Elizabeth, which directs the ſlitting of the noſe by way of infamous puniſhment expreſsly directs that the *noſtrils* ſhall be *ſlit*. But Lord C. B. Parker, Gould, and Yates, juſtices, were of opinion that the ſlitting of the noſe was not confined to any particular form or direction; but that any diviſion of the fleſh or griſtle of the noſe, whether it were perpendicular or tranſverſe, came within the denomination of a ſlit, and was equally a diſfiguring of the party. That the ſtatute of Elizabeth was more confined than the Coventry act, which extends to the ſlitting of the noſe generally, and not to any particular part of it: that the latter was a general law, not to be explained away by nice criticiſms on words; but yet to be conſtrued with caution,

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Slitting of the noſe within the act may be by a tranſverſe cut.

tion,

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tion, ſo as not to be extended to caſes not within the intent of the legiſlature.

Rex v. Coke and Woodburn, 6 St. Tr. 212. 215. 223. Poſt. p. 400.

It is to be obſerved alſo that in the caſe of Coke and Woodburn the ſlitting of the noſe which brought them within the act was a cut *acroſs* the noſe which ſeparated the fleſh of it, and cut it quite through into the noſtril. And there it was objected that the noſe could not be ſaid to be *ſlit*, becauſe the edge of it was not cut through; but the Lord Chief Juſtice Pratt over-ruled the objection.

§ 4. *Act to the perſon aimed at.*

2. *Againſt whom the offence in general may be committed.*

2 Hawk. ch. 23. ſ. 16.

It does not ſeem neceſſary that the malicious intention deſcribed ſhould be directed againſt any particular individual. If it be conceived againſt all perſons who may happen to fall within the ſcope of the perpetrator's deſign, the particular miſchief done to any one ſhall be connected with the general malignant intent, ſo as for the ſtatute to attach upon the offenders. This is neceſſarily to be inferred from Carrol's caſe before ſtated, who was an entire ſtranger to the gentleman whom he thus aſſaulted, and who could not have been perſonally in his contemplation till the occaſion occurred on the ſudden. So if a blow be intended to maim one, and by accident maim another, the party is equally liable to be indicted or appealed for ſuch maim. The ſtatutes of H. 4. H. 8. and Car. 2. are evidently directed to the maiming of others: but a perſon who even maims himſelf, or procures another to maim him, that he may have more colour to beg; or diſables himſelf to prevent being preſſed for a ſoldier; is ſubject to fine and impriſonment at common law; and ſo is the party by whom it was effected at the other's deſire.

Ante, p. 394.

Wright's caſe, Leiceſter aſſizes, 11 Jac. 1. Co. Lit. 127. 1 Hale, 412.

§ 5. *Lying in wait.*

3. *What is a lying in wait.*

There muſt be proof of a deliberate deſign by lying in wait to commit the offence deſcribed in the act, in order to bring the caſe within it. In general what ſhall be conſidered as a lying in wait on purpoſe to maim or diſfigure muſt depend very much on the concomitant circumſtances of

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of each caſe. In Mills's caſe, who was indicted on this ſtatute, the court ſaid, a perſon who intends to do this kind of miſchief to another, and by deliberately watching an opportunity carries that intention into execution, may be ſaid to lie in wait on purpoſe. It is not neceſſary that he ſhould plant himſelf in any particular concealment, and effect the miſchief by ruſhing from his lurking place, in order to bring the offence within the meaning of the ſtatute. If, having formed an intention to maim, he take a convenient opportunity of deliberately doing the injury, it is a lying in wait; although he do not take any particular length of time, or appear to uſe any extraordinary degree of preparation to perpetrate the miſchief. The circumſtances there were that the priſoner in conjunction with a large gang of thieves beſet the proſecutor as he was coming down Holborn Hill with his maſter's cart loaded with ſugar; and after aſſaulting him and giving him ſeveral ſevere wounds in different parts of his body, while he was endeavouring to eſcape into a neighbouring houſe, ſeveral of them cried out, "Damn you, where are your knives?" upon which the priſoner made a ſtroke at him with a large knife, and gave him a dreadful wound from ear to ear, which divided his noſe, and otherwiſe injured him. The cart, however, was not robbed, and no other motive could be aſſigned for this cruel outrage than that the proſecutor had detected and beat off ſome thieves who had attempted to rob his cart the preceding evening near the ſame place. Eyre, B. left it to the jury with the obſervations before mentioned, whether the fact were deliberately and intentionally done by lying in wait for that purpoſe, on the account ſuggeſted, or from any other malicious and deliberate motive; or whether it were a ſudden violent impulſe of rage, not in the previous contemplation of the parties; in which latter caſe it was not within the ſtatute: but he laid ſtreſs on the expreſſion uttered by ſome of the gang, "Where are your knives," as explanatory of a previous deſign to do ſuch a miſchief. The jury found the priſoner guilty. Upon the conference between the judges on Carrol's caſe, Willes, J. and Eyre, B. who leant moſt to a ſtrict conſtruction of the words "lying in wait for the purpoſe &c." yet were of opinion, that the circum-

Rex v. Mills, O. B. April 1783. cor. Eyre C. B. Leach, 172. 2. laſt edit. 294.

Carrol's caſe, ante f. 3. MS. Gould J.

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circumſtance of Carrol's paſſing before Mr. Kirby, and waiting till he came up, and then giving him the wound, was a lying in wait within the ſtatute. This inquiry is always ſtrictly connected with the enſuing one.

§ 6. *For what purpoſe.*

4. As to the intent.

Although a perſon be maimed or diſfigured maliciouſly, yet the caſe will not fall within the ſtatute unleſs the offender lie in wait for that purpoſe. In Carrol's caſe before mentioned expreſs evidence was given of ſuch an intent; though doubtleſs that cannot be neceſſary, but may be inferred from pregnant circumſtances, which I think exiſted in that caſe independent of that fact. For it appeared that the priſoner meditated perſonal violence of ſome ſort againſt any perſon who ſhould arreſt his confederates, and that he was armed with a knife for that purpoſe, with which he effected it.

Carrol's caſe, ante, ſ. 3.

But where the injury aroſe out a ſudden attack, unconnected with any premeditated deſign againſt the perſon, it was holden not to be within the ſtatute.

Rex v. Tickner, O. B. Feb. 1778. MS. Gould and Buller Js. S. C. Leach, 170. laſt edit 222.

Thomas Tickner was indicted on this act for maiming William Jacob. The proſecutor at 12 o'clock at night went to his maſter's field to ſee if any one were ſtealing turnips, his maſter having loſt many before, and found the priſoner in the very act of taking them (*a*). On his going up and ſpeaking to him, the priſoner immediately ſtruck him with an inſtrument partly wood and partly iron, the iron hanging looſe to the wood ſomething like a flail, and cut his noſe, and gave him ſeveral other wounds. Mr. Juſtice Gould left it to the jury, whether, conſidering the time of night and the weapon, they were ſatisfied that the priſoner was determined to maim or deſtroy any perſon who ſhould oppoſe him in his purpoſe of ſtealing turnips. The jury found him guilty: but afterwards all the judges [abſente De Grey, Ch. J.] held that there was not ſufficient evidence of a lying in wait within the act; and ſome of them conſidered that the having the inſtrument and uſing it was with intent to eſcape and not to murder or maim.

(*a*) This is made a miſdemeanor by 13 G. 3. c. 32.

And the ſame line of conſtruction has been adopted even where perſonal violence was intended, it being of a dif-

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a different and leſs atrocious ſort, and with a different view.

Alexander Mackey was indicted on the ſtatute for lying in wait and diſabling and maiming the left arm and two middle fingers of the left hand of William Fletcher, and Arrigoni for being preſent, aiding and abetting. It appeared that Fletcher, who was not bred to the ſea, and at that time kept a lottery-office, being in a public-houſe near his office, went out towards it on hearing that a preſs gang was about. Some of the preſs gang aſked him his buſineſs at the door, and on being informed let him paſs. Soon after Mackey, who appeared as the head of the gang, entered Fletcher's office with ſome of his men, and laid hold of him, and on being aſked if he knew him anſwered, "Yes, damn you, and I will be revenged." It appeared that a year and a half before, Mackey had been arreſted at the other's ſuit. Mackey and his men then dragged the proſecutor, who reſiſted being taken, into the ſtreet, where the former ſaid "to it boys" to his men. The proſecutor was brought to the ground by a bludgeon, and afterwards wounded by Mackey with his ſword in the manner deſcribed in the indictment, who bid his men cut away; but they cried ſtop; it is enough. The queſtion left to the jury as to Mackey, was whether the wounding were of malice forethought; on which they found him guilty: but nothing being proved againſt Arrigoni except that he was one of the preſs-gang preſent, he was acquitted by the direction of the court. And the queſtion being referred to the judges, whether there were any evidence of a lying in wait to bring Mackey within this act; they were of opinion at a conference on the 6th May 1773, that however criminal the aſſault was in other reſpects, yet it did not fall within the intent and purview of the ſtatute; there being no lying in wait within the ſtatute.

Rex v. Mackey and Arrigoni, Kingſton Sp. Aſſ. 1778. MS. Crown Caſ. Reſ. and MS. Gould J.

The commander of a preſs-gang maiming a man whom he caſually met, and who reſiſted being impreſſed, (being in truth no mariner,) but againſt whom he appeared to have an antecedint grudge, is not a lying in wait within the ſtatute.

But though the ſtatute add, "with intention to maim or "diſfigure" the party, yet if the intent were of a higher and more atrocious nature, namely, to murder him, and in that attempt the offender do not kill but only maim him, it is an offence within the act: for thoſe additional words relating to the intent are merely auxiliary to the preceding words,

1 MS. Sum. 222. 1 Hawk. ch. 44. ſ. 6. 4 Bac. Abr. 487.

"on

Ch. VII. § 6. *By the Coventry act.*

" on purpoſe and of malice forethought;" confining the crime to an intended violence. But if a corporal violence be intended, the more malignant the intention the more clearly it falls within the malice deſcribed by the act. Beſides, it is a known rule of law that if a man intend to commit one ſpecies of felony, and in the proſecution of that commit another, the law will connect his felonious intention with the felony actually committed, though different in ſpecie from that which he originally intended.

Rex v. Coke and Woodburne Suffolk, 8 G. 1. 6 St. Tr. 212. 219. 222. 228.

Coke and Woodburne lay in wait to kill Mr. Criſpe; and to effect the murder Woodburne gave him ſeveral blows on the head with a ſharp bill or hook; and when they thought him dead, left him weltering in his blood. Criſpe however recovered; and as one of the blows with the hook had happened to ſlit his noſe, the priſoners were indicted on the Coventry act. In their defence they inſiſted that their intent was to murder Criſpe, and not to maim him, and therefore that they were not within the ſtatute. But Lord King ſaid, that the intention was a matter of fact to be collected from all the circumſtances of the caſe, and as ſuch was proper to be left to the jury; and that if it were the intention of the priſoners to murder, it was to be conſidered whether the means made uſe of to accompliſh that end, and the conſequences of thoſe means were not likewiſe in their intention and deſign; and whether every blow and cut were not intended, as well as the object for which the priſoners inſiſted they were given; and the jury finding them guilty, they were executed. Upon this caſe Mr. Juſtice Yates has obſerved, that it ſeemed to him that the whole aim of this defence, allowing the intention to be what the priſoners contended, was inſufficient; and that an intention of violence more criminal and malignant could not excuſe them from one that was leſs ſo. Yet on the conference of the judges on Carrol's caſe, Willes J. and Eyre B. expreſſed ſome diſſatisfaction with this caſe, and thought at leaſt that the conſtruction ought not to be carried further.

MS. ut ſupra.

MS. Gould J.

§ 7. *Acceſſaries.* 1 Hale, 618. Tracy's MS. 215. b. 2 Hawk. ch. 29. ſ. 5. 19.

Lord Hale conſiders that there are no acceſſaries before in mayhem, for that they are in the ſame degree as principals; and if the nature and puniſhment of the offence at common

law, which was in effect only a treſpaſs, be conſidered, it favours that opinion. Hawkins however ſays, that there may be acceſſaries before; but that the appellant has his election to proceed againſt them either as principals or acceſſaries; and herewith agrees Staundford, to whom Lord Hale expreſsly refers. Yet I cannot help ſuſpecting, upon a more accurate inſpection of the authorities on which this laſt opinion is founded, that it is a miſtake, proceeding perhaps upon the old notion which prevailed till after the time of Ed. 3. that thoſe who were preſent aiding and abetting, but did not commit the fact, were *acceſſaries at the fact.* The authorities in ſupport of it are all reſolvable into 40 Aſſize 1. 9. and 41 Aſſize 16., and there it is ſaid that the ancient law was that each ſhould be appealed as principal; but that now the appellant may elect to make all principals, or elſe only the one who ſtruck principal, and the others acceſſaries. But Brook on one of theſe paſſages ſays, *quod nota; and it ſeems that the ancient law was the beſt;* for *it is only treſpaſs in effect.* And on the other he obſerves, quod mirum; *for in mayhem there are no acceſſaries.* And in the time of H. 6. it appears to have been conſidered that in mayhem all were principals; as well he who comforts and abets, as he who ſtrikes the ſtroke. And certainly it is againſt the received opinion at this day, that a perſon can be both acceſſary and principal in reſpect of the very ſame act.

Ch. VII. § 7. *Principals and acceſſaries.*

Staundf lib 1. ch. 47. 22 Aſſize pl. 82 Fitz. Coron. 182, &c.

Fitz. Abr. Coron. 215. 221. Treſp 199. Bro. Appeal, 71. 76.

Bro. Appeal, 72.

Bro. Appeal, 154. *vide* alſo 71.

21 H. 6. Fitz Coron. 11. *Vide* pl. 60.

Vide Gordon's caſe, ante, f. 122. and tit. Principal and Acceſſary.

It no where however appears that there can be acceſſaries after the fact in mayhem.

The ſtat. 22 & 23 Car. 2. c. 1. expreſsly extends to counſellors, aiders, and abettors who know of and are privy to the offence; and therefore includes all acceſſaries before.

1 MS. Sum. 223.

But where it appeared, as in Arrigoni's caſe, that a perſon, though preſent at the fact, and guilty of a treſpaſs and aſſault, was yet altogether ignorant of any intention to maim, &c. he was directed to be acquitted in the firſt inſtance, before the guilt or innocence of the perpetrator was aſcertained.

Arrigoni's caſe, ante, p. 399.

§ 8. *Appeal and Indictment.*

An appeal of mayhem (though now diſuſed) lies as well as an indictment, and the words "*felonioufly*" and "*maimed*" are eſſential to both. The word *felonioufly* was required,

3 Inſt. 118. 2 Hawk. ch. 23. ſ. 15. 17, 18. 24. ch. 25, ſ. 55.

Ch. VII. § 2. *Appeal and Indictment.*

because anciently the party was subject to the loss of member, though he is no longer so now.

If an appellant count of battery, the writ abates; because it supposes no battery.

2 Hawk. ch. 23. s. 20. 75.

It is also necessary as in murder to set forth particularly in what manner the hurt was given; and the consequences following it; concluding, that so the defendant feloniously maimed, &c. but the omission of the former is not helped by such general conclusion.

2 Hawk. ch. 25. s. 57. ch. 23. s. 79.

1 MS. Sum. 222.

Where the indictment is formed upon the statute of Car. 2. it must pursue the words of the statute, and allege the offence to be *on purpose, of malice aforethought, and by lying in wait*; and that the act was done *with intent to maim and disfigure*. The usual form is that the prisoner, contriving and intending one A. B. being a subject, &c. to maim and disfigure, with force and arms, &c. and on purpose and of his malice aforethought and by lying in wait, unlawfully and feloniously did make an assault with a certain knife, &c. and did on purpose and of his malice aforethought, and by lying in wait, unlawfully and feloniously slit the nose of the said A. B. with intention the said A. B. in so doing in manner aforesaid to maim and disfigure &c. against the stat. &c.

Vide Crown Cir. Com. 323. and Carrol's case, 1 Leach, 66. last edit.

But as the words of the statute are in the disjunctive, an averment either that it was with intent *to maim*, or with intent *to disfigure*, according to the subject matter, seems to be sufficient.

§ 9. *Defences.*

2 Hawk. ch. 23. s. 23. 1 Ld. Raym. 177. 11 Mod. 43. Bull. N. P. 18. Post. 406.

1. It seems clear that son assault demesne is a good defence either to an indictment, or an appeal of mayhem; but it must be specially pleaded to the latter. Yet it is not every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel and malignant intention, or after the blood was heated in the scuffle: but it must appear that the assault was in some degree porportionable to the mayhem (*a*).

2 Hawk. ch. 23. s. 23.

But a man cannot justify maiming another in defence of his possessions, but only in defence of his person. This restriction however cannot be intended to extend to cases, where a man defends himself against a known felony threatened to be committed with violence against even his property.

(*a*) S. P. Durnford v. Smith, Sarum, 12 G. 2. per Ld. C. B. Parker; and Osborne v. Haddock, Middlesex, 1738, per Ld. C. J. Willes, MS. Burnet.

Ch. VII. § 9. *Defences.*

2. A recovery in an action of treſpaſs for an aſſault, battery, and wounding, may be pleaded in bar of an appeal of mayhem, appearing by proper averments to be brought for the ſame treſpaſs: for it ſhall be intended that the jury in giving damages for the wounding included the maim, and no man ſhall be liable to double vexation for the ſame thing. Yet may the appellant perhaps avoid ſuch plea by replying ſpecially, that the maim was occaſioned ſince the verdict in the action of treſpaſs by ſome ſubſequent mortification, dryneſs, or ſhrinking of the part by reaſon of the wound (*a*).

2 Hawk. ch. 23. ſ 22.

(*a*) Q. May not the court in ſuch caſes increaſe the damages on view? *Vide* Bull. N. P. 21.

3. Such appeal may be barred either by arbitrament, or an accord with ſatisfaction executed, or even by a releaſe of all actions perſonal; becauſe at this day the appellant ſhall recover nothing but damages.

2 Hawk. ch. 23. ſ. 24, 25. 4 Bac. Abr. 487.

4. A nonſuit in an appeal of mayhem, after the plaintiff has appeared in it, may be pleaded in bar of any other; but not a nonſuit in an action of treſpaſs.

2 Hawk. ch. 23. ſ. 26.

5. It is to be obſerved, that in appeal of mayhem, though it be felonice, yet the defendant cannot plead in abatement, and plead over to the felony; as he may, in favorem vitæ, in caſe of felony in general.

Tracy's MS. 180. b. Noy, 36. Cro. Eliz. 495. Moor, 457. 2 Hawk. ch. 23. ſ. 128. Poſt. *Proſecution by appeal.*

§ 10. *Trial.*

If the defendant put in iſſue whether the plaintiff were maimed or not, *and pray that the part which was hurt be viewed by the court*, in order to have it adjudged on ſuch view whether there be any mayhem or not; the court may on view of the part determine the matter; or if in doubt may award a writ to the ſheriff to return ſome able phyſicians and ſurgeons for the better information of the court. But though the defendant pray their view, they are not bound to try it in that manner, but may order a trial by a jury; and may alſo direct that the jury ſhall have a view of the wound; and an adjudication by either on ſuch view is concluſive. It follows that the plaintiff muſt appear in proper perſon, and not by attorney.

2 Hawk. ch. 23. ſ. 27.

It ſeems alſo to be holden, that the defendant in an appeal of maim may in ſome caſes wage battle; but it does not appear to have been ever actually waged. The puniſhment at common law, and by ſtatute, has been reſpectively noticed.

2 Hawk ch. 23. ſ. 28.

CHAP. VIII.

Of felonious, malicious, and unlawful Aſſaults upon the Perſon, with Intent to kill, wound, or otherwiſe injure the Party, or to rob him, or obſtruct him in the Execution of his Duty.

Common Aſſault, and Battery. - - § 1.
Juſtification or Excuſe. *ib.*
Puniſhment. *ib.* Enhanced if the Intent were to commit Felony or high Miſdemeanor. *ib.*
Aſſaulting Privy Counſellors, capital Felony by ſtat. 9 Ann. c. 16. - - - § 2.
Aſſaulting Members of Parliament, a high Miſdemeanor, by ſtat. 11 H. 6. c. 11. *ib.*
Clergymen. ib.
Malicious ſtriking in the King's Palace, puniſhable by 33 H. 8. c. 12.; if Blood ſhed, by Loſs of Hand, Impriſonment for Life, and Forfeiture. § 3.
The ſame if a Blow be ſtruck *in Weſtminſter Hall,* or before Juſtices of Aſſize, &c. ſitting the Courts. *ib.*
How *Indictment* ſhould lay the Offence. *ib.*
Aſſaults in Churches and Church-Yards puniſhed by branding, &c. by ſtat. 5 & 6 Ed. 6. c. 4. § 4.
Aſſault with Intent to murder, &c. at common Law. § 5.
If the Homicide, had it enſued, would only have been Manſlaughter, it does not ſuſtain the Count. *ib.*
Shooting at another a capital Felony by ſtat. 9 G. 1. c. 22. - - - -. § 6.
Though Offender not diſguiſed. *ib.*
Malice neceſſary to bring Offender within the Act. *ib.*
Muſt be with Inſtrument and in a Direction calculated to create Danger. *ib.*
There may be *Principals* in the ſecond Degree. § 7.
Indictment and Evidence. - - § 8.
The Offence muſt be laid to be done *wilfully and maliciouſly.* ib.

How

How far neceſſary to prove it in the ſame Perſon's Dwelling-houſe as laid. - - §8.
Trial may be in any County. - - §9.
Aſſault with Intent to rob. - - §10.
Felony and Tranſportation by ſtat. 7 Geo. 2. c. 21. *ib.*
Breaking Gaol or returning from Tranſportation before Term expired, ouſted of Clergy. *ib.*
What a Demand of Money, &c. within the Statute, and how far neceſſary. - - §11.
The Act is in the disjunctive, and *the Indictment* muſt either charge an unlawful and malicious Aſſault with an offenſive Weapon, with Intent to rob, &c. or that there was a Demand of Money, by Menaces or in a forcible or violent Manner, with the like Intent. §12.
As to the Deſcription of the offenſive Weapon. §13.
Aſſaults on Revenue Officers; vide Offences relating to the Cuſtoms and Exciſe. - - §14.
Aſſaults on Perſons wrecked with Intent to kill, &c. Felony without Clergy by Stat. 26 Geo. 2. c. 19. §15.
Aſſaulting Officers and others on account of their Endeavours to preſerve the Property, &c. Tranſportation for 7 Years. *ib.*
Aſſaults by Mariners againſt their Commander to obſtruct his Defence of his Ship, &c. Piracy and Felony by Stat. 22 & 23 Car. 2. c. 11. and 11 & 12 W. 3. c. 7. §16.
Aſſault on account of Gaming. - - §17.
By Stat. 9 Ann. c. 15. Forfeiture of perſonal Eſtate, and Impriſonment for two Years. *ib.*
The Offence muſt ariſe out of and during the Play. *ib.*
Aſſault with Intent to ſpoil Cloaths. - §18.
Felony and Tranſportation for 7 Years, by Stat. 6 G. 1. c. 23. *ib.*
If Intent were to wound, though the Cloaths muſt be and were cut in ſo doing, not within the Statute. *ib.*
Aſſault with Intent to obſtruct the free Paſſage of Grain. §19.
By Stat. 36 G. 3. c. 9. and 11 G. 2. c. 22 firſt Offence a Miſdemeanor cognizable by Juſtices of Peace. *ib.* Second Offence Felony and Tranſportation for 7 Years. *ib.* Returning before the Term expired ouſted of Clergy. *ib.*

With [illegible] malice, or [illegible] Intent, &c.

Case in Error [illegible] Action for Damages [illegible] Court of King's Bench [illegible] Term, [illegible] Information for [illegible] Term [illegible] &c.

Of forcible, malicious, and unlawful Assaults upon the Person, with Intent to kill, wound, or otherwise injure the Party, or to rob him, or of Affrays committed in the Execution of the Law.

Common Law.

LITTLE I proceed to mention assaults of an aggravated kind, for which particular provision has been made by the law, it may be proper to advert to what are called common assaults and batteries, which I find are very fruitfully, as they are in fact, confined in other books treating of the civil remedy for them to the party grieved.

1 Hawk. ch. 62, s. 1, 2.

An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as create at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it. Where the injury is actually inflicted, it amounts to a battery, (which includes an assault;) and this, however small it may be; as by spitting in a man's face, or any way touching him in anger without any lawful occasion. But if the occasion were merely accidental and undesigned, or if it were lawful, and the party used no more force than was reasonably necessary to accomplish the purpose, as to defend himself against a prior assault, or to arrest the other, or make him desist from some wrongful act or endeavour, or the like; it is no assault or battery in the law, and the party may justify the force; and any matter in justification or excuse, such as son assault demesne, may upon an indictment be given in evidence under the general issue: and the defendant who is charged with an assault and battery, may be found guilty of the one and acquitted of the other. But son assault demesne is no excuse, if the retaliation by the defendant were excessive, and bore no proportion to the necessity, or the provocation received. These offences are punishable by fine and

Battery.

Justification or excuse.

1 Hawk. ch. 62, s. 23.

Ib. ch. 62, s. 1, 3.

Bull. N. P. 14 & anno 11. Maybem p. quia. Punishment, 4 Blac. Com. 217.

and impriſonment and finding ſureties, or with other ignominious corporal penalties, ſuch as the pillory, where they are committed with any very atrocious deſign; as in the caſe of aſſaults with intent to murder, raviſh, or commit other felonies or high miſdemeanors; which intent, to be collected from the circumſtances of the caſe, is no doubt a very great aggravation of the offence.

Ch. VIII. § 1. *Common aſſault and battery.*

Aſſault with intent to commit felony, &c.

I proceed now to the conſideration of various aſſaults of an aggravated nature, which have been made the ſubjects of legiſlative proviſion.

§ 2. *Aſſaulting privy counſellors.*

The firſt ſpecies of felonious aſſault with intent to kill or otherwiſe hurt, whereof the legiſlature has enhanced the penalty, is one which has been already noticed. The ſtat. 9 Ann. c. 16. enacts, "that if any perſon or perſons ſhall "unlawfully attempt to kill, or ſhall unlawfully aſſault and "ſtrike or wound any perſon being a privy counſellor, when "in the execution of his office of a privy counſellor in "council or in any committee of council; the perſon or "perſons ſo offending, being thereof convicted in due form "of law, ſhall be declared felons, and ſuffer death without "benefit of clergy."

9 Ann. c. 16. Ante, p. 89.

Members of parliament, &c. 11 H. 6. c. 11.

By the prior ſtat. of the 11 H. 6. c. 11. (enforcing a ſimilar proviſion in the ſtat. 5 H. 4. c. 6.) "If any aſſault or "affray be made to any lords ſpiritual or temporal, knight of "the ſhire, citizen, or burgeſs, come to the parliament, or "to other council of the king by his commandment, and "there being and attending at the parliament or council; "that then proclamation ſhall be made in the moſt open "place of the town by three ſeveral days, where the aſſault "or affray ſhall be made, that the party who made ſuch "affray or aſſault yield himſelf before the king in his Bench "within a quarter of a year after the proclamation made if "it be in term, or otherwiſe at the next day in the term "following the ſaid quarter; and if he do not, that he be "attainted of the ſaid deed, and pay double damages to the "party grieved, to be taxed by the diſcretion of the juſtices "of the ſame Bench, or by inqueſt if needful, and make "fine and ranſom at the king's will. And if he come, and "be found guilty by inqueſt, by examination, or otherwiſe,

Ch. VIII. § 2. *Common aſſault and battery.*

" of ſuch affray or aſſault, then he ſhall pay to the party " grieved his double damages found by the inqueſt or to be " taxed by the diſcretion of the ſaid juſtices, and make fine " and ranſom at the king's will as above ſaid."

Clergymen. 9 Ed. 2. c. 3.

Aſſaults on clergymen are inquirable before the king's courts by the ſtat. 9 Ed. 2. c. 3.

§ 3. *In the king's palace.* 33 H. 8. c. 12. 3 Inſt. 140. 4 Blac. Com. 124.

By the ſtat. 33 H. 8. c. 12. " all malicious ſtrikings, by " which blood is ſhed, againſt the king's peace, within any " of the king's palaces or houſes, or any other houſe at ſuch " time as the royal perſon ſhall happen to be then demur- " rant or abiding, ſhall be inquired of and tried before the " Lord Steward, &c. (in the manner therein ſtated). And " by ſ. 7. any perſon found guilty of the ſaid offence ſhall " have judgment to have his right hand ſtricken off before " the ſaid Lord Steward, &c. at ſuch place or time as ſhall " be appointed, and alſo ſhall have judgment of impriſon- " ment for life, and ſhall pay fine and ranſom at the king's " pleaſure." Certain caſes are afterwards excepted.

In Weſtminſter-hall, &c. 3 Inſt. 140. 4 Blac. Com. 125. 1 Hawk. ch. 21. ſ. 3, &c. Staundf. 38.

If any man in Weſtminſter-hall or in any other place, ſitting the courts of Chancery, Exchequer, K. B. and C. B., or before juſtices of aſſize or oyer and terminer, ſhall draw a weapon upon any judge or juſtice, though he ſtrike not, this is a great miſpriſion, for which he ſhall loſe his right hand, ſuffer perpetual impriſonment, and forfeit his lands for life, and his goods and chattels. So it is if in Weſtminſter-hall, or any other place, ſitting the ſaid courts there, or before juſtices of aſſize or oyer and terminer and within view of the ſame, a man ſtrike a juror, or any other, with weapon, hand, ſhoulder, elbow, or foot, he ſhall have the like puniſhment; otherwiſe if he only make an aſſault, and ſtrike not. Hence it ſeems, that in order to warrant the higher judgment for loſs of member, &c. the indictment ought expreſsly to charge a ſtroke; though it do not appear whether any technical word be neceſſary to be uſed for this purpoſe. *Vide* 1 Sid. 211.

Rex v. Lord Thanet & others, B. R. Trin. 39 Geo. 3. MS.

In a late caſe, the information ſet forth a ſpecial commiſſion to ſeveral of the judges and others for the trial of Arthur O'Connor and others for high treaſon at Maidſtone, &c.; and that pending the ſeſſions, after the acquittal of O'Connor, and before any order or direction had been made by the court for

for his diſcharge, the defendants in open court, &c. made a great riot, and riotouſly attempted to reſcue him out of the cuſtody of the ſheriff of Kent, to whoſe cuſtody he had been aſſigned by the ſaid juſtices and commiſſioners; and the better to effect ſuch reſcue and eſcape did at the ſaid ſeſſions, in open court, and in the preſence of the ſaid juſtices and commiſſioners, riotouſly, &c. make an aſſault on one J. R. and did then and there *beat*, *bruiſe*, *wound*, and ill-treat the ſaid J. R., and thereby impede and obſtruct the ſaid juſtices, &c. This was the ſubſtance of the three firſt counts. The fourth count, after ſtating the holding of the ſaid ſeſſion before the juſtices and commiſſioners, barely charged that the defendants unlawfully and maliciouſly intending to break the peace, and hinder the due and peaceable holding of the ſaid ſeſſions, did with divers others in open court at and during the continuance of the ſaid ſeſſion, and in the preſence of the ſaid juſtices and commiſſioners, on &c. at &c. riotouſly &c. aſſemble together to break the peace and hinder the due and peaceable holding of the ſaid ſeſſions, and being ſo aſſembled did then and there with force and arms at the ſaid ſeſſions, in open court and in the preſence aforeſaid riotouſly, &c. make a great riot and diſturbance, &c. and thereby for a long time interrupt and obſtruct the ſaid juſtices, &c. in the lawful and peaceable holding of the ſaid ſeſſion, to the hindrance of public juſtice. The 5th count was ſtill more general. Two of the defendants were found guilty generally; and when they were brought up to receive judgment, Lord Kenyon intimated conſiderable doubt, whether the court were not bound to paſs the judgment of amputation, &c. for the offence ſo laid in the three firſt counts; and the matter ſtood over for conſideration. In the mean time the difficulty was avoided in the preſent inſtance by the gracious interpoſition of the crown, as appears by the entry on the roll; ſtating in ſubſtance, that before judgment was pronounced the Attorney General ſaid, that he had received his Majeſty's royal commands and warrant concerning the priſoners, and the aforeſaid miſdemeanor, &c. under the ſign manual; wherein after reciting that ſuch an information had been exhibited againſt the defendants, on which they had been found guilty, his Majeſty thought fit to diſcharge them from ſuch parts of

Ch. VIII. § 3. *In the courts of Weſtminſter, &c.*

the ſaid information on which any doubt had ariſen or might ariſe whether the judgment thereon were diſcretionary in the court, and authoriſed the Attorney General to enter a noli proſequi as to ſuch parts, and to pray judgment only on ſuch charges as left the puniſhment in the diſcretion of the court. Accordingly a noli proſequi was entered on the three firſt counts; and on the 4th and 5th the court gave judgment, that Lord Thanet ſhould pay a fine of 1000l. and be impriſoned in the Tower for a year, and give ſecurity for ſeven years, himſelf in 10,000l. and two ſureties in 5000l. each; and that Mr. Ferguſon ſhould pay a fine of 100l., be impriſoned for a year, and find ſurety for ſeven years, himſelf in 500l. and two ſureties in 250l. each.

Cro. Eliz. 405. Cro. Car. 374. Cary's caſe, Owen, 120.

It is alſo ſaid, that in order to warrant the higher judgment the offence muſt be charged to have been committed in the preſence of the king or of the juſtices.

Vide authorities ante. p. 408. in margin.

But the reſcue of a priſoner in or before any of the ſaid courts, committed by any of the ſaid juſtices, is a great miſpriſion, for which the party and the priſoner aſſenting to it ſhall have the higher judgment, excepting the loſs of his hand, where no ſtroke or blow is given.

§ 4. *In churches and church yards.* 5 & 6 Ed. 6. c. 4.

By ſtat. 5 & 6 Ed. 6. c. 4. f. 2. "If any perſon or perſons ſhall ſmite or lay violent hands upon any other, either in any church or church-yard, that then ipſo facto every perſon ſo offending ſhall be deemed excommunicate." And by ſ. 3. "if any perſon ſhall maliciouſly ſtrike any perſon with any weapon in any church or church-yard; or ſhall draw any weapon in any church or church-yard to the intent to ſtrike another with the ſame weapon; every perſon ſo offending and thereof being convicted by verdict, or by his own confeſſion, or by two lawful witneſſes, before the juſtices of aſſize, of oyer and terminer, or juſtices of peace in their ſeſſions, by force of this act, ſhall be adjudged by the ſame juſtices before whom ſuch perſon ſhall be convicted to have one of his ears cut off; or if he have no ears, then he ſhall be marked and burned in the cheek with a hot iron, having the letter F therein, as a fray-maker and fighter, and further he ſhall ſtand ipſo facto excommunicated." This laſt part

1 Burr. 243.

of the puniſhment preſcribed is no part of the judgment to be pronounced by the common law courts: but follows upon the judgment being tranſmitted to the eccleſiaſtical court, on a proceeding inſtituted thereon. Ch. VIII. § 4. *In churches and church-yards.*

The indictment muſt allege that the weapon was drawn with intent to ſtrike, &c.; barely charging that one drew his dagger againſt another is not ſufficient to bring the caſe within the ſtatute. Perchall's caſe, 2 Leon. 188. Cro. Eliz. 465. 2 Hale, 171.

Of Aſſaults with Intent to murder, &c.

§ 5. *Aſſault with intent to murder, &c.*

In the earlieſt ages of our law it ſeems to have been conſidered that the bare attempt to commit murder was felony; but that idea was ſoon exploded; though ſtill the attempt is puniſhable as a high miſdemeanor at common law. In the 16 Car. 2. Mr. Bacon was indicted and convicted for lying in wait to kill Sir Harbottle Grimſtone, maſter of the rolls, and was ſentenced to fine and impriſonment, and to find ſurety for his good behaviour for life, and to acknowledge his offence at the bar of the court of Chancery. If in the attempt to kill the party he be actually maimed under the circumſtances deſcribed in the Coventry act before mentioned, the offender is guilty of a capital offence, although the intent, as in Coke and Woodburn's caſe, was to murder and not to maim. But where Mitton was charged in an indictment for an aſſault with intent to murder Mr. Creſpigny; and it appeared in evidence that the defendant, a ſoldier, in marching in file along the Strand, had wantonly joſtled the proſecutor off the pavement, who thereupon ſtruck him with a ſmall ſtick which he had in his hand; on which the defendant lowering his muſquet, had aimed a blow at the proſecutor with his bayonet fixed thereon, and thruſt him under the ear: Lord Kenyon C. J. being of opinion that if death had enſued, it would only have been manſlaughter, directed the jury to acquit the defendant upon the firſt count of the indictment, charging the aſſault to be with intent to murder. On the other hand where upon an indictment for an aſſault with intent to commit a rape, the proſecutrix proved a rape actually committed, Buller J. directed an acquittal, as the miſdemeanor was merged in the felony. Staundf. 17. Bacon's caſe, 1 Lev. 146. 1 Sid. 230. 4 Blac. Com. 196.

Vide the laſt chapter, p. 400.

Mitton's caſe, adjourned ſittings at Weſtminſter, October 1788, cor. Ld. Kenyon C. J. MS.

Harmwood's caſe, Wincheſter Spr. Aſſ. 1787. cor. Buller J. MS.

But

Ch. VIII. § 6.

§ 6
Shooting at another.
9 G. 1. c. 22. ſ. 1.
Made perpetual by 31 G. 2. c. 42.

But the ſtatute under which proſecutions of this ſort are moſt frequently carried on is the ſtat. 9 Geo. 1. c. 22. (commonly called the Black Act), which enacts that "If "any perſon or perſons ſhall wilfully and maliciouſly ſhoot "at any perſon in any dwelling-houſe or other place; or "ſhall forcibly reſcue any perſon being lawfully in cuſtody "of any officer or other perſon for ſuch offence; or if any "perſon or perſons ſhall by gift or promiſe of money or "other reward procure any ſubject to join him or them "in any ſuch unlawful act; every perſon ſo offending, being "thereof lawfully convicted, ſhall be adjudged guilty of "felony, and ſuffer death without benefit of clergy." (*a*)

2 MS. Sum. 352. Rex v. Arnold, 1723, at Kingſton, 8 St. Tr. 290. 313.

In the conſtruction of this branch of the act it has been holden that the offence under conſideration has no relation to the preceding part of the clauſe, confining the deſcription of the offenders therein mentioned to "perſons armed, &c. and having their faces blacked or being otherwiſe diſguiſed." And Arnold was convicted thereon for ſhooting at Lord Onſlow, though he had not his face blacked nor was otherwiſe diſguiſed at the time; and this was approved of by all the judges.

Malice.
4 Blac. Com. 207. & *Vide* Gaſtineaux's caſe, O. B. May 1786, cor. Adair Serjt. Rec. Seſſ. Pap. p. 738. 748.

Malice is an eſſential ingredient in this offence; and in order to bring the caſe within the ſtatute, it muſt be ſuch a ſhooting at another, as if death had enſued the homicide would have been murder. It follows that neither an accidental ſhooting, which is neither wilful nor malicious, nor a ſhooting in the intemperance of paſſion, upon ſuch a provocation as would in law reduce the homicide to manſlaughter, are within the meaning of the ſtatute.

Vide Harris's caſe, tit. *Arreſt.*

Shooting at.
4 Blac. Com. 207.

Though it be not neceſſary that any evil conſequence ſhould enſue, yet the *ſhooting* at muſt be with a gun or other inſtrument, ſo loaded as to create danger to the party aimed at, the probable conſequence of which would be to kill or maim him; and it muſt be levelled *at* him. And therefore, where Cook a landlord had diſtrained for rent, and put a man in poſſeſſion; and coming in the night to ſee the man, the priſoner his tenant attacked him and wounded him with

Empſon's caſe, O. B. 1781, cor. Adair Serjt. Recorder, Seſſ. Pap. p. 240.

(*a*) See alſo the clauſes touching the ſurrender of ſuch offenders, on proclamation for that purpoſe, tit. *Larceny*, (*Dear.*)

a ſword

a ſword in revenge for the diſtreſs; and Cooke making his eſcape in the dark by a different way from what he had entered the premiſes, the priſoner finding he was gone, and not knowing where, fired a gun towards the place where Cooke had entered, which was in a different direction from the way he was then going; the court directed an acquittal.

Ch. VIII. § 6. *Shooting at another.*

§ 7. *Principals, accomplices, and acceſſaries.*

This ſtatute at once creating a new felony and making it capital, it muſt be ſo with all its conſequences, and therefore the rule of law attaches, that every perſon preſent, aiding and aſſiſting, muſt be a principal in the ſecond degree. John Granger and ſix other coal-heavers were indicted upon this ſtatute, for that they with certain guns loaded, &c. feloniouſly did wilfully and maliciouſly ſhoot at one John Green, he then being in his dwelling-houſe, &c. Four of the priſoners fired at Green through the windows of his houſe: the other three were preſent when their companions fired, but uſed no fire-arms themſelves. But all were aſſembled in a tumultuous manner before Green's houſe, which they attacked; he having rendered himſelf obnoxious to them by being concerned in carrying into execution an act of parliament for the regulation of the wages of coal-heavers. They were all found guilty and executed; the judges being of opinion, upon reference to them, that the above mentioned rule of law attached upon this caſe; that the offence was joint and ſeveral; and that one indictment was ſufficient againſt all.

2 MS. Sum. 518. Rex v. Bear, Ld. Holt's MS. 32. Granger's caſe, (called the coal-heavers' caſe,) O. B. 1768. cor. Ld. Ch. B. Parker, Gould, and Aſton Js. Leach, 61. (laſt edit. 1 vol. 76.)

Per Gould J. MS. Buller J. 2 MS. Sum. 222.

Gibſon and two others were indicted on the ſtatute, for that they with a loaded piſtol, &c. did wilfully, maliciouſly, and feloniouſly ſhoot at John Hardwood, &c. Gibſon was found guilty, and the other two acquitted. It was objected that three could not be guilty of the ſame act of ſhooting, and that the indictment charging the act to have been done by three, one only could not be convicted. The judges did not determine this caſe, the priſoner having been convicted of another capital offence at the ſame time. But at the conference upon it in Eaſter term 1785, Gould J. mentioned the above caſe of the coal-heavers as in point: and Eyre B. ſaid that ſeveral might be guilty of the ſame act of ſhooting

Rex v. Gibſon, Mutton and Wiggs, Kingſton Lent Aſſ. 1785, MS. Gould and Buller Js. 2 MS. Sum. 522. Leach, 397. laſt edit. S. C.

Ch. VIII. § 7. *Shooting at an officer.*

ing, as if a ſtring were tied to the trigger and they all pulled it.

Weſt' caſe, Kent Sp. Aſſ. 1716, MS. Buller and Gould Ju. & MS. Jud.

Finally in Wells' caſe the indictment charged that the priſoner and divers others unknown did with a loaded gun, &c. unlawfully, wilfully, maliciouſly, and felonioufly ſhoot at one James Paxton. And the ſecond count charged that a perſon unknown wilfully, &c. ſhot at J. P. and that the priſoner unlawfully, wilfully, maliciouſly, and felonioufly, was preſent, aiding, and abetting the aforeſaid perſon, &c. and concluded that ſo the priſoner, the felony laſt above mentioned, in manner and form laſt aforeſaid, unlawfully, &c. did do and commit, and each of them did do and commit, &c. It appeared that a center-bit, an iron crow, a dark lantern, and a brace of piſtols having been found hid in Mr. M'Ullock's cart-houſe at Charlton in Kent, Paxton with ſome others armed had been ſet to watch there. On the ſame night the priſoner and ſeveral others came to the ſpot, and being challenged to ſtop by thoſe who were ſet to watch, a conflict enſued, in the courſe of which ſeveral ſhots were fired, one of which was levelled at Paxton by one of the gang, though probably not by the priſoner himſelf, as he was ſeen coming over a fence near Paxton at the ſame time. The marks of bullets were afterwards ſeen in the boards of an adjoining outhouſe, in the direction in which the gun was fired at Paxton. Mr. Juſtice Aſhhurſt, before whom the priſoner was tried, told the jury that if they were of opinion that the priſoner and the other men were in a confederacy together to make an attack upon Mr. M'Ullock's houſe, and came armed with an intention to oppoſe all reſiſtance; and that in the proſecution of that purpoſe *the priſoner or any of his aſſociates* ſhot at the proſecutor, then they ſhould find the priſoner guilty; if not, they ſhould acquit him. The jury having found him guilty; upon reference to the judges, they were all of opinion that the direction was right and the conviction proper: and that the coal-heavers' caſe was good law.

Eaſter Term 1786.

§ 8. *Indictment and evidence.*

The indictment muſt purſue the words of the act, and charge the offence to have been done "*wilfully* and *maliciouſly*" as well as *feloniouſly*. In Davies' caſe, it was laid to

Rex v. Davies, Hereford Sum. Aſſ. 1788, and laſt edit. S.C.

before all the judges in Hil. T. 1789. MS. Buller J. and MS. Jud. 2 Leach, 556.

to be done "unlawfully, maliciouſly, and felonioufly," omitting *wilfully*; and held ill by a majority of the judges; who conſidered the words "wilfully and maliciouſly" as in part deſcriptive of the offence created by the ſtatute; and that they were bound by former precedents (*a*) in analogous caſes, however the ſenſe and legal import of the words might be the ſame.

Ch. VIII. § 8. *Shooting at another.*

(*a*) *Vi.* Cro. Eliz. 147. Hetl. 12.

The ſtatute ſays "if any perſon ſhall ſhoot at any perſon *in any dwelling-houſe or other place.*" Count Duroure was indicted on the act for ſhooting at H. Sandon in the dwelling-houſe of *James Brewer* and *John Sandy*; and it appeared that the names of the owners were *John* Brewer and *James* Sandy. This was ruled to be a fatal variance; for though it was ſaid not to be neceſſary to ſtate the fact to have happened in any perſon's houſe, the words of the act being "in any dwelling-houſe *or other* place;" yet ſuch a fact having been averred, it muſt be proved as laid. However the ſame ſort of averment has ſince been ruled not to be immaterial in proſecutions for robbery, clergy being ouſted in all caſes. And in Harris' caſe, on an indictment on this act, an objection, that the priſoner having fired at the party within his own houſe, was not within the meaning of the act, was over-ruled.

Duroure's caſe, O. B December 1784, cor. Hotham B. Seſſ. Pap. 229. 2 Leach, 390. S. C.

Vide Pye's caſe, and Johnſtone's caſe, tit. *Larceny* and *Robbery.* (*Indictment*) Rex v. Harris, Salop Sp. Aſſ. 1801, and afterwards before all the judges. MS. Jud.

It is alſo enacted by the ſame ſtatute (ſ. 14.) that the offences therein deſcribed may be "tried and determined "in any county in England, in ſuch manner and form as "if the fact had been therein committed." But no attainder thereon ſhall work corruption of blood, loſs of dower, or forfeiture. This option has been ruled to extend to private proſecutors: but it behoves all ſuch to recollect that this right is not to be exerciſed for the purpoſes of injuſtice and oppreſſion, the words of the act being *for the better and more impartial trial, &c.*

§ 9. *Trial.* 9 Geo. 1. c. 22. ſ. 14.

Rex v. Mortis, H. 11 G. 3. 2 Blac. R. 733.

Aſſault with intent to rob.

Another offence falling within the preſent claſs is that of aſſaulting another with intent to rob him, which at common law was only puniſhable as a miſdemeanor; though by ſome it

§ 10. *Aſſaul. with intent to rob.* Staundf. 27. b.

Ch. VIII. § 10. *With intent to rob.*

it had been conſidered as felony, upon the miſtaken maxim that voluntas reputabatur pro facto. But now by the ſtat. 7 Geo. 2. c. 21. for the more effectually preventing ſuch endeavours it is enacted, "That if any perſon or perſons "ſhall, with any offenſive (*a*) weapon or inſtrument, un- "lawfully and maliciouſly aſſault; or ſhall, by menaces, or "in or by any forcible or violent manner, demand any "money, goods, or chattels, of or from any other perſon "or perſons; with a felonious intent to rob or commit rob- "bery upon ſuch perſon or perſons; that then and in every "ſuch caſe, all and every ſuch perſon and perſons ſo "offending, being thereof lawfully convicted, ſhall be "adjudged guilty of felony, and be liable to be tranſported, "as in caſes of felony. And the courts by and before "whom he, ſhe, or they ſhall be tried and convicted ſhall "have power of tranſporting ſuch offenders for ſeven years, "upon the like terms and conditions, and by the ſame ways "and means, and in like manner as other felons may be "tranſported to any of the colonies in America by any law "now in being."

7 Geo. 2. c. 21.

By ſ. 2. "If any ſuch offender break gaol, or eſcape be- "fore ſuch tranſportation, or ſhall return into any part of "Great Britain or Ireland before the expiration of the ſaid "ſeven years, &c. contrary to the intent and meaning of the "act; every perſon ſo breaking gaol, eſcaping, or returning, "&c. being thereof lawfully convicted, ſhall ſuffer death as "felons without benefit of clergy."

§ 11. *What is a Demand, and how far neceſſary.* Parſait's caſe, O. B. Dec. 14, 1748. Serjt. Forſter's MS. Leach, 19 (laſt edit. 23.) S. C.

As to what ſhall be conſidered as a ſufficient demand of money, &c. and how far that is neceſſary: Peter Parfait was indicted on this ſtatute for aſſaulting Thomas Wheſton on the highway with a piſtol, with intent to rob him. Upon evidence it appeared that the defendant did not make any demand, or motion or offer to demand the priſoner's money, but only held a piſtol in his hand towards the priſoner, who was a coachman and on his box, and bid him ſtop. By Lord C. J. Willes; a man who is dumb may make a demand of money, as if he ſtop a perſon on the highway

(*a*) As to what ſhall be conſidered as an *offenſive* weapon, *vide* tit. *Offences relating to the Cuſtoms and Exciſe.*

with

with a piſtol, and put his hat or hand into the carriage, or the like: but in this caſe as the priſoner only held a piſtol at the coachman, but ſaid nothing to him but "ſtop;" that was no demand of his money as the act requires, and therefore it was not within the act; and Chappel J. according, the priſoner was acquitted by the direction of the court, without entering into his defence. Ch. VIII. § 11. *With intent to rob.*

I cannot forbear obſerving upon the note of the above caſe, (the accuracy of which I much doubt,) that it may ſeem to countenance an opinion that it was not barely ſufficient in order to bring an offender within the act that he ſhould make an aſſault upon another with a felonious intent to rob him, but that he ſhould alſo make a demand of his money, &c. though it was admitted that ſuch demand need not be by words, but might be collected from the acts of the party. Now the words of the act are in the diſjunctive, that if any perſon with any offenſive weapon, &c. ſhall aſſault, or ſhall by menace in or by any forcible or violent manner demand any money, &c. of or from any other perſon, with *a felonious intent to rob, &c.* Upon this I conceive the jury are to decide with what intent the aſſault or demand was made; and if they find that the defendant aſſaulted the proſecutor with a felonious intent to rob him, it brings the caſe expreſsly within the words as well as ſpirit of the act. But even if it were otherwiſe, yet, with great deference to the opinion ſuppoſed to have been delivered in the above caſe, the fact of ſtopping another on the highway by preſenting a piſtol at his breaſt is, if unexplained by other circumſtances, ſufficient evidence of a demand of money to be left to the jury: the unfortunate ſufferer underſtands the language but too well: and why muſt courts of juſtice be ſuppoſed ignorant of that which common experience makes notorious to all men. There is however another caſe in print, which, when the circumſtances of it and the true point in judgment are conſidered, will perhaps ſerve to explain the former one. William Thomas was indicted on this ſtatute before Mr. J. Aſhhurſt, for maliciouſly and felonioufly aſſaulting one John Lowe on the highway with a piſtol, with a felonious intent to rob him. It appeared that as the proſecutor was travelling in a chaiſe in the evening, the priſoner Poſt. 418.

Rex v. Thomas O. B. July 1784. cor. Aſhhurſt Seſſ. Pap. p. 974. S. C. Leach, 271. laſt ed. 3/2

Ch. VIII. § 11. *With intent to rob.*

after following it ſome time preſented a piſtol at the poſt-boy and bid him ſtop, making uſe at the ſame time of many violent oaths, but not making any demand of money. The carriage was immediately ſtopped, and the priſoner turned towards it, but perceiving that he was purſued, he immediately rode away without doing or ſaying any thing to Mr. Lowe who was in the chaiſe, and he was ſoon after taken. Upon this indictment the court directed the jury that the evidence was not ſufficient; for the charge was not for an aſſault with intent to rob the poſtilion, but for an aſſault on Mr. Lowe with intent to rob him; of which there was no evidence: he was therefore acquitted: and at the ſame ſeſſions was tried upon another indictment for an aſſault on B. Dring the poſt-boy with intent to rob him. But the ſame evidence being given, the court obſerved that it was very clear that the priſoner did not mean to rob the poſt-boy; for when he preſented the piſtol to him and bid him ſtop, he made no demand on him, but went up to the perſon in the chaiſe. The true point therefore which is to be collected from theſe caſes is, that it muſt appear that the aſſault was made upon the perſon againſt whom the felonious intent is directed; which perhaps may be agreeable to the ſtrict conſtruction of the ſtatute, which has the word of reference *ſuch*. The truth of the caſe to be collected from the circumſtances appears to have been, that the actual aſſault was upon the poſt-boy, but the intent was to rob the perſon in the carriage; for as ſoon as the poſt-boy ſtopped, the priſoner turned from him towards the chaiſe. It does not appear whether he afterwards advanced towards Mr. Lowe in ſuch a manner as to amount to an implied aſſault upon his perſon: it may rather be collected that he was interrupted before he had time to advance. Theſe obſervations may ſerve to explain the opinion given in Parſait's caſe, where it may be remembered that the proſecutor was a *coachman*, and the charge was for aſſaulting *with intent to rob him*. But other caſes which occurred ſoon after the laſt have put the conſtruction of the act in this reſpect out of doubt. Truſty and Howard were indicted for a felonious aſſault on John Halſe, with a certain offenſive weapon called a piſtol, with a felonious intent to rob him. On evidence it appeared that the priſoners

Seſſ. Pap. p. 1015. cor. the Dep. Rec.

The aſſault muſt be made upon the perſon intended to be robbed.

Ante, 416.

Rex v. Truſty and Howard, O. B. July 1785, Seſſ. Pap. 735.

priſoners ruſhed out of the hedge on the proſecutor, who was the driver of a returned chaiſe, as he was paſſing along the road; and one of them preſenting a piſtol to him bid him ſtop, which the boy did, but called out for aſſiſtance to ſome perſons whom he had met juſt before. On this one of the priſoners threatened to blow his brains out if he called out any more; which the proſecutor nevertheleſs continued to do; and preſently he obtained aſſiſtance and took the men, who had made no demand of money. They were convicted and tranſported. The following caſes, which turned on the form of the indictment, underwent full conſideration, and ſerve alſo to explain the true nature of the offences deſcribed in the act.

§ 12. *Form of indictment.*

The indictment in the caſe of Jackſon and Randall charged that the priſoners unlawfully, maliciouſly, and felonioufly made an aſſault on A. Gilleſpie, and him the ſaid A. G. unlawfully and maliciouſly did menace, by menacing to blow his brains out, with a felonious intent the monies of the ſaid A. G. from his perſon and againſt his will felonioufly to ſteal, take, and carry away, againſt the ſtatute, &c. The Recorder thought the indictment defective; for that it was neceſſary in the terms of the act either to charge that the aſſault was made with an offenſive weapon, or that money, &c. was demanded; (neither of which were ſtated here;) though it was not neceſſary to charge both. The fact turned out to be, that the two priſoners and another man, in the night, ſuddenly laid hold of the proſecutor at the end of Craig's Court, and bid him not to ſay a word or they would blow his brains out; but while one of them was ſearching in his own pocket, (probably for an iron bar, which was ſoon after let drop by one of them,) but before any demand actually made or any weapon produced, the proſecutor made reſiſtance, and by the help of a watchman ſecured two of them, and the other who ran away was afterwards taken. After conviction, the queſtion was reſerved for the opinion of the Judges, whether the indictment in deſcribing the manner in which the offence was committed muſt not neceſſarily ſtate either that the aſſault was made *with an offenſive weapon* with a felonious intent to rob, &c. *or* that *by menaces*, or, *in or by a forcible*

Rex v Jackſon and Randall, O. B. April 1783, Seſſ. Pap 477. S.C. Leach, 225. laſt edit 303

Indictment muſt either charge that an aſſault was made with an offenſive weapon with intent to rob, &c. or that there was a demand of money, &c. with ſuch intent.

c. VIII. § 12. *With intent to*

a forcible or violent manner a demand of money, &c. was made *with a felonious intent, &c.*, the words of the act being throughout in the disjunctive. The opinion of the Judges was afterwards delivered, that the indictment was inſufficient in not having ſtated that the aſſault was made with an offenſive weapon, *or* that any demand was made, &c.

J. 1 Sess. 1-8, Sess. Rep. 72.

Rex v. Remnant, H. 3 G. 3. 5 Term Rep. 169.

So in Remnant's caſe, where he was committed for that with force and arms he made an aſſault on the proſecutor with intent feloniouſly to ſteal, take, and carry away from his perſon, &c. This not being a charge of any offence within the ſtatute, the court bailed him.

Pegge's caſe, Derby Aſſ. 1789, cor. Thomſon B. MS. Buller J. & MS. Jud.

If the indictment only charge an aſſault, it muſt be laid to be unlawful and malicious as well as felonious: but that is not neceſſary if it alſo lay a felonious demand of goods in a forcible and violent manner.

In Pegge's caſe the indictment charged, that the priſoner with a certain offenſive weapon or inſtrument called a ſtick in and upon J. R. feloniouſly did make an aſſault, and did then and there in a forcible and violent manner feloniouſly demand the goods, &c. of him the ſaid J. R. with a felonious intent to rob him, &c. and his goods, &c. from his perſon and againſt his will feloniouſly to ſteal, take, and carry away, againſt the ſtatute, &c. The fact was clearly proved, that the priſoner meeting the proſecutor in the highway held up a large club to him and bid him "ſtand and deliver;" but being reſiſted afterwards ran away. The priſoner was found guilty. But the words of the ſtatute not being purſued in that part of the indictment which charged the priſoner with aſſaulting the proſecutor with an offenſive weapon, the indictment, not laying it to be done *unlawfully and maliciouſly*, which according to a late determination of Davis's caſe on the Black Act ſeemed neceſſary, judgment was reſpited till the opinion of the Judges could be taken, which was done in Trin. term 1789, when the conviction was holden right; the act being in the diſjunctive; and an offence within the ſtatute being well laid in the latter part of the indictment, without the words unlawfully and maliciouſly. It ſeems therefore admitted in the above caſe, that where the aſſault is the only offence charged within the act, it muſt be laid to be done *unlawfully and maliciouſly* as well as feloniouſly.

Ante, f. 8.

Monteth's caſe, O. B. October 1795, cor Thomſon B. and Heath J.

So the intent to rob muſt be alleged; and therefore where the indictment only charged that the priſoner with force and arms, i. e. with a certain offenſive weapon, &c. unlawfully, maliciouſly,

maliciouſly, and felonioufly made an aſſault on W. the proſecutor "with a felonious intent the goods, chattels, and monies of the ſaid W. from the perſon and againſt the will of the ſaid W. then and there felonioufly to ſteal, take, and carry away;" the court held that this was not a ſufficient deſcription of the offence within the ſtatute; namely, an attempt to rob, which always includes force and violence. Therefore the priſoner was diſcharged from this indictment, and a new one preferred againſt him, alleging the aſſault to be "with a felonious intent the monies of the ſaid W. from the perſon and againſt the will of the ſaid W. then and there felonioufly and *violently* to ſteal, take, and carry away, &c." on which indictment he was convicted.

Ch. VIII. § 12. *With intent to rob.*

2 Leach, 809. *vide* Seſſ. Pap. p. 1300 and 1325.

How the intent to rob muſt be charged.

§ 13. *Deſcription of weapon.*

As to the deſcription of the weapon uſed, this follows the ſame rule as in the caſe of homicide. Sharwin was indicted for having, with force and arms, with a certain offenſive weapon called a wooden ſtaff, unlawfully, maliciouſly, and felonioufly made an aſſault on J. Gough, with a felonious intent to rob him; againſt the ſtatute, &c. It appeared that while Gough and one Jenkinſon were riding together in the highway, Gough received a violent blow from a great ſtone which was thrown by the priſoner from the hedge. Going towards the ſpot from whence they ſaw the priſoner running acroſs the field, and following him, Gough aſked him how he could be ſuch a villain as to throw the ſtone; on which the priſoner threatened Gough, and ran to and ſtruck him violently with a ſtaff, till at length he was overcome and ſecured. The priſoner's face was blacked, and he denied his name; but on being queſtioned afterwards as to his motive, he ſaid he was very poor, and wanted half-a-guinea to pay his brewer. He did not aſk for money or goods. After conviction the queſtion was ſubmitted to the Judges, whether this evidence were ſufficient to maintain the charge in the indictment? In Michaelmas term following, (ten Judges being preſent,) all held the conviction proper: for here the weapon laid in the indictment and the weapon proved produce the ſame ſort of miſchief, namely, by blows and bruiſes; and this deſcription would have been ſufficient upon an indictment for murder.

Ante, p. 341. Sharwin's caſe, Oakham, July 8th 1785, cor. Gould J. MS. Buller J.

Ch. VIII. § 14. *With intent to rob.*

§ 14. *Aſſaults on revenue officers.*

With reſpect to aſſaults upon revenue officers in the execution of their duty, or on account thereof, the offence is ſo intimately blended with other "offences relating to the cuſtoms and exciſe," that it will be more conveniently conſidered under that head.

§ 15. *On perſons wrecked.* 26 G. 2. c. 19. ſ. 1 See further tit. Malicious Miſchief, and Larceny.

As to aſſaults on perſons wrecked. By ſtat. 26 Geo. 2. c. 19. "If any perſon or perſons ſhall beat, or wound, "with intent to kill or deſtroy, or ſhall otherwiſe wilfully "obſtruct the eſcape of any perſon endeavouring to ſave his "or her life from ſuch (viz. any ſhip or veſſel of his ma"jeſty's ſubjects or others, which ſhall be in diſtreſs, or "which ſhall be wrecked, loſt, ſtranded, or caſt on ſhore, "in any part of his majeſty's dominions) ſhip or veſſel, or "the wreck thereof; ſuch perſon or perſons ſo offending "ſhall be deemed guilty of felony, and being lawfully con"victed thereof ſhall ſuffer death without benefit of clergy."

By ſ. 11. of the ſame act, "If any ſheriff or his deputy, "juſtice of the peace, mayor, or other magiſtrate, coroner, "lord of a manor, commiſſioner of the land-tax, chief or "petty conſtable, or other peace officer, or any cuſtom-houſe "or exciſe officer, or other perſon lawfully authoriſed, ſhall "be aſſaulted beaten and wounded, for or on account of the "exerciſe of his or their duty, in or concerning the ſalvage "or preſervation of any ſhip or veſſel in diſtreſs, or of any "ſhip or veſſel, goods or effects, ſtranded, wrecked, or caſt "on ſhore, or lying under water, in any of his majeſty's do"minions; then any perſon or perſons ſo aſſaulting beating "and wounding, ſhall upon trial and conviction, by indict"ment at the aſſizes or general gaol delivery or at the quarter "ſeſſions for the county, riding, or diviſion, where ſuch "offence ſhall be committed, be tranſported for ſeven years "to ſome of his majeſty's colonies in America; and ſhall "be ſubject to ſuch ſubſequent puniſhment in caſe of return "before that time as other perſons under ſentence of tran"ſportation are by the law ſubjected unto."

§ 16. *By mariners.* 22 & 23 Car. 2. c. 11. and 11 & 12 W. 3. c. 7. See more under tit. Piracy.

By the ſtat. 22 & 23 Car. 2. c. 11. ſ. 9. for the ſuppreſſion of piracy, it is enacted, that "if any mariner ſhall lay violent "hands on his commander, whereby to hinder him from "fighting

" fighting in defence of his ship and goods committed to his trust; he shall suffer death as a felon." The stat. 11 and 12 W. 3. c. 7. s. 9. more fully enacts that " any person" guilty of that offence " shall be adjudged to be a " pirate felon and robber, and being convicted thereof, according to the directions of that act, shall suffer death, " and loss of lands goods and chattels as pirates," &c. Ch. VIII. § 16. *By mariners, &c. on commanders.*

§ 17. *Assault on account of gaming, &c.*

By stat. 9 Ann. c. 15. s. 8. for preventing quarrels on account of gaming, " In case any person or persons whatsoever shall assault and beat, or challenge or provoke to " fight any other person or persons whatsoever, upon account of any money won by gaming playing or betting at " any of the games aforesaid, (i. e. by s. 1. at cards, dice, " tables, tennis, bowls, or other game or games whatsoever); " such person or persons assaulting, &c. or challenging, &c. " upon the account aforesaid shall, being thereof convicted " upon an indictment or information, forfeit all his goods " chattels and personal estate whatsoever, and be imprisoned " in the common gaol of the county where such conviction " shall be had for two years."

Rex v. Randal and others, Bristol Sum. Ass. 1787.

On an indictment against Randal and others upon this statute, for assaulting the prosecutor on account of money won at gaming, the latter proved that he had been gaming with the defendants, and having lost his money to them, they had proposed breaking up and going away, but that he objected to it and wanted them to play on, saying that they had won his money, and would give him no opportunity of recovering it back; upon which they had committed the assault. Buller J. was of opinion that the game being over before the assault began, the assault could not be said to have arisen out of the game, but from what the prosecutor had said to the defendants. And that it was necessary in order to bring a case within the statute, that the assault should arise out of the play and during the time of playing: but that here the play was over, and the dispute had arisen from the prosecutor's own words: and therefore he directed the jury to acquit them of the charge.

Ch. VIII. § 18. *With intent to ſpoil garments.*

§ 18. *Aſſault with intent to ſpoil garments.* 6 G. 1. c. 23. ſ. 11.

By ſt. 6 G. 1. "If any perſon or perſons ſhall at any time "wilfully and maliciouſly aſſault any perſon or perſons in the "public ſtreets or highways with an intent to tear, ſpoil, cut, "burn, or deface, and ſhall tear, ſpoil, cut, burn, or deface "the garments or cloaths of ſuch perſon or perſons; every "ſuch offender, being thereof lawfully convicted, ſhall be "adjudged guilty of felony and liable to the pains and pe-"nalties thereof; and the courts by and before whom he "ſhe or they ſhall be tried ſhall have power of tranſporting "ſuch felon and felons for ſeven years, on the like terms "and conditions as are mentioned in this act and the ſtat. "4 Geo. 1. c. 11."

Vide general head of Tranſportation.

4 Blac. Com. 245.

This ſtatute was occaſioned by the inſolence of certain weavers and others, who upon the introduction of ſome Indian faſhions prejudicial to their own manufactures made it a practice to deface them, either by open outrage, or by privily cutting or caſting aqua fortis in the ſtreets upon ſuch as wore them.

Rex v. Renwick Williams, O. B. July 1790, cor. Buller J. MS. Buller J. and MS. Jud. Leach, 426. S.C. 1 ſt edit. 597. (Abient Lord C. B Eyre and Wilſon J.)

If the intent were to wound, though the cloaths muſt be and were cut by the manner of executing ſuch intent, the caſe is not within the ſtatute.

The aſſault muſt be made with the intention deſcribed in the act: therefore where the direct intention of the party aſſaulting was to wound the wearer, although in ſo doing the cloaths muſt have been and were in fact cut, it is no offence within this ſtatute. This was ruled by a conſiderable majority of the Judges to whom the matter was referred, in Renwick Williams's caſe, who was convicted on this ſtatute; a caſe of the moſt brutal malignity; where the priſoner actuated by ſome horrible and indeſcribable motive, without the ſmalleſt provocation or even reſentment againſt the unhappy ſufferer, aſſaulted a lady of the name of Porter in the ſtreets of London, and gave her a violent blow over the hip with ſome ſharp inſtrument, which cut through her cloaths, making a rent of two feet and more, and wounded her very ſeverely. Buller J., who thought the caſe came within the ſtatute, relied on the authority of Coke and Woodburn's caſe. He conſidered that the intent of the priſoner was to wound the party by cutting through her cloaths; and therefore that he muſt have intended to cut her cloaths; and the jury, whoſe ſole province it was to find the intent, had expreſsly ſo found it. The majority who thought

Ante, p. 400.

otherwiſe

otherwiſe held that in order to bring a caſe within the act, the primary intention of the priſoner muſt be to tear or deface, &c. the cloaths. The judgment however in that caſe turned ultimately upon a defect in the form of the indictment, which charged, that the priſoner on the 18th January, 30 Geo. 3. at the pariſh of St. James, &c. wilfully, maliciouſly, and felonioufly did make an aſſault on A. P. with intent wilfully and maliciouſly to tear, ſpoil, cut and deface her garments, cloaths, &c. And that the ſaid priſoner *on the ſaid 18th January, &c.* at the pariſh aforeſaid, &c. did wilfully, &c. tear, &c. certain garments, &c. of the ſaid A. P., to wit, a ſilk gown, &c. which ſhe then had and wore on her perſon, againſt the form of the ſtatute, &c. All the Judges preſent agreed that the indictment was ill for want of an allegation that the cloaths were cut *at the ſame time* that the aſſault was made with intent to cut them; the words *then and there* not being added. It was not enough to charge that the cloaths were *cut* on *the ſame day* that the aſſault was made, which was all that the indictment aſſumed to do.

Ch. VIII. § 18. *With intent to ſpoil garments.*

Vide Buckler's caſe, Dy. 68. R. v. Frances, Com. R. 478.

§ 19. *Aſſault with intent to obſtruct the free paſſage of grain.* See further tit. Malicious Miſchief. 36 G. 3. c. 9.

By ſtat. 36 Geo. 3. c. 9. "An act to prevent obſtruc- "tions to the free paſſage of grain within the kingdom." "If any perſon or perſons ſhall wilfully and maliciouſly "beat, wound, or uſe any other violence to or upon any "perſon or perſons, with intent to deter or hinder him or "them from buying of corn or grain in any market or "other place within this kingdom; or unlawfully beat or "wound the driver of any waggon, cart, or other carriage "or horſe, loaded with wheat, flour, meal, malt, or other "grain, with intent to ſtop ſuch wheat, &c. every and all "ſuch perſon or perſons being thereof lawfully convicted "before any two or more juſtices of the peace of the "county, &c. wherein ſuch offence ſhall be committed, "or before the juſtices of peace in open ſeſſions, ſhall be "ſent to the common gaol or houſe of correction, there to "continue and be kept to hard labour not leſs than one nor "exceeding three months. And every perſon ſo offending "a ſecond time, and being thereof lawfully convicted, ſhall "be adjudged guilty of felony, and be tranſported for ſeven "years, in like manner as other felons are directed to be "by

2d offence felony, and tranſportation for ſeven years.

Ch. VIII. § 19. *Obſtructing paſſages of grain.*

"by law. And if any ſuch offender, ſo tranſported, ſhall "return into this kingdom before the expiration of the "ſaid ſeven years, he or ſhe ſhall ſuffer death as a felon, "without benefit of clergy." Saving the corruption of blood and loſs of dower.

11 G. 2. c. 22.

The ſame proviſions were before enacted by the ſtat. 11 Geo. 2. c. 22. ſtill in force; with this addition, that for the firſt offence the juſtices were alſo directed to adjudge the offender to be publicly whipped by the keeper of the gaol or houſe of correction in ſuch city, market-town, or ſea-port, in or near which the offence was committed, on the firſt convenient market-day, at the market-croſs or place, between the hours of 11 and 2. In both the ſtatutes there is a proviſion, "That no perſon puniſhed for any "offence by virtue thereof ſhall be puniſhed for the ſame "offence by virtue of any other law or ſtatute." But by the ſtat. 36 Geo. 3. it is provided, "that nothing therein "contained ſhall be deemed to abridge or take away any "proviſion already made by law or any part thereof, for "the ſuppreſſion or puniſhment of any offence mentioned "in the act."

§ 20. *On maſter woolcombers.* 12 G. 1. c. 34. ſ. 6.

By ſtat. 12 Geo. 1. c. 34. ſ. 6. "If any perſon or per- "ſons ſhall aſſault or abuſe any maſter woolcomber or "maſter weaver, or other perſon concerned in any of the "woollen manufactures of this kingdom, whereby any ſuch "maſter or other perſon ſhall receive any bodily hurt for "not complying with, or not conforming, or not ſubmit- "ting to any ſuch illegal by-laws, ordinances, rules, or "orders aforeſaid;" (that is, as appears by ſ. 1. all contracts, covenants, or agreements, and all by-laws, ordinances, rules, or orders, in unlawful clubs and ſocieties, entered into by perſons brought up in, profeſſing, uſing, or exerciſing the art and myſtery of a woolcomber or weaver, or journeyman woolcomber or journeyman weaver in this kingdom, for regulating the ſaid trade or myſtery, or for regulating or ſettling the price of goods, or for advancing their wages, or for leſſening their uſual hours of work;) "every "perſon ſo knowingly and wilfully offending in the premiſes, "being thereof lawfully convicted, upon any indictment

"to

" to be found within twelve calendar months next after any " ſuch offence committed, ſhall be adjudged guilty of " felony, and ſhall be tranſported for ſeven years to one of " the colonies or plantations in America, in ſuch manner, " &c. and under ſuch pains and penalties as felons in other " caſes are by law to be tranſported."

Ch. VIII. § 20. *On maſter wool-combers.*

By ſ. 8. the like proviſions are extended to " combers of " jerſey and wool, frame-work knitters, and weavers or " makers of ſtockings, and to all perſons whatſoever em- " ployed or concerned in any of the ſaid manufactures," &c.

For other offences of a ſimilar nature, I muſt refer to the title of Malicious Miſchief, &c.

CHAP. IX.

FALSE IMPRISONMENT AND KIDNAPPING.

1. *False Impriſonment* at Common Law. - § 1
Arreſt of *Ambaſſadors*, &c. declared illegal by 7 Ann. c. 12.; inquirable before a particular tribunal. § 2
2. *Kidnapping*, or the ſtealing and carrying away of any Perſon, a great Miſdemeanor at Common Law § 3
When done in the *Northern Counties* for the ſake of Ranſom or Plunder, made Felony without Clergy by ſtat. 43 Eliz. c. 13. *ib.*
Sending the Party abroad only a Miſdemeanor at Common Law. - - - - § 4
Puniſhable by Habeas Corpus Act with 500 *l.* Damages, to be recovered, and by the Penalties of a Præmunire, and Incapacity to hold Office, or receive a Pardon for it. - - - *ib.*
Maſters of Ships wilfully leaving Perſons on Shore in foreign Countries ſhall ſuffer 3 Months Impriſonment by ſtat. 11 & 12 W. 3. c. 7. - § 5

False Impriſonment.

§ 1. *False impriſonment.*

WHAT has been ſaid before reſpecting common aſſaults and batteries will ſuffice alſo to excuſe the brevity of this chapter. The ſubject of falſe impriſonment is amply diſcuſſed in books treating of the civil redreſs of the party injured, which are in common uſe. In one of theſe it is deſcribed to be every reſtraint of a man's liberty under the cuſtody of another, either in a gaol, houſe, ſtocks, or in the ſtreet, whenever it is done without a proper authority. Whatever is a legal juſtification of the impriſonment, may be given in evidence under the general iſſue, upon an indictment; as in the caſe of an aſſault: and the puniſhment for this offence is as in the caſe of other miſdemeanors.

Bull. Ni. Pri. 22. & *vide* 6 Bac. Abr. 569.

There

Ch. IX. § 2. *Arrest of ambassadors, &c.*

There is one species of arrest by legal process, however regular in the frame of it, which on account of the high interest of the nation in the consequences, has been declared to be illegal, and consequently the parties concerned are guilty of false imprisonment; and that is the arrest of foreign ambassadors. The stat. 7 Ann. c. 12. declares, "that all writs and processes sued or prosecuted, whereby "the person of any ambassador or other public minister of "any foreign prince or state, authorized and received as "such by her majesty, &c. or the domestic or domestic "servant of any such ambassador or other public minister, "may be arrested or imprisoned, or his or their goods or "chattels seized, &c. shall be null and void to all intents "and purposes." And by s. 4. "In case any person or "persons sue forth or prosecute any such writ or process, "such person and persons, and all attornies and solicitors, "prosecuting and soliciting in such case, and all officers "executing any such writ or process, being thereof con-"victed by the confession of the party, or by the oath of "one or more credible witnesses, before the Lord Chan-"cellor, or Lord Keeper of the Great Seal, the chief "justices of B. R. and C. B., or any two of them, shall be "deemed violators of the laws of nations, and disturbers of "the public repose; and shall suffer such pains, penalties, "and corporal punishment as the said Lord Chancellor, &c. "or any two of them shall judge fit to be imposed and in-"flicted:" Sect. 5. provides "that no merchant or other "trader within the bankrupt laws, who shall put himself "in the service of such ambassador, &c. shall take any "benefit by the act.; and that no person shall be proceeded "against as having arrested the servant of an ambassador or "public minister, by virtue of this act, unless the name of "such servant be first registered in the office of one of the "principal secretaries of state, and by him transmitted to "the sheriffs of London and Middlesex, &c. who shall "hang up the same in some public place in their offices, "whereto all persons may resort and take copies thereof "without fee or reward."

§ 2. *Vide* 1 Blac. Com. 255. 7 Ann. c. 12.

Kidnapping.

The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law,

§ 3. Ld. Grey's case, T. Raym. 473. Comb. 10.

Ch. IX. § 3.

law, punishable by fine, imprisonment, and pillory. Of this nature is the offence pointed out by the stat. 43 Eliz. c. 13. which reciting that many subjects dwelling and inhabiting within the counties of Cumberland, Northumberland, Westmoreland, and the bishoprick of Durham, had been taken, some from their houses, others in travelling, or otherwise, and carried out of the same counties, or to some other place within the same, as prisoners, and cruelly treated till they have been redeemed by great ransoms, &c. enacts, "that whoever shall without good and lawful warrant and "authority, take any of the queen's subjects against his or "their will, and carry them out of the same counties, or "to any other place within any of the said counties, "or detain, force, or imprison him or them as prisoners, "or against his or their wills, to ransom them, or to make "a prey or spoil of his or their person or goods, upon "deadly feud, or otherwise: or whoever shall be privy, "consenting, aiding, or assisting unto any such taking, "detaining, or carrying away, or procure the taking, de-"taining, or carrying away of any such person or persons "prisoners as aforesaid; and shall be of any of the said "offences indicted and lawfully convicted, or shall stand "mute, or challenge peremptorily above 20 jurors before "the justices of assize, gaol delivery, oyer and terminer, "or of the peace, within any of the said counties, at some of "their general sessions, &c. shall be adjudged felons and "suffer death without benefit of clergy, and shall forfeit as "in case of felony."

In the northern counties.

43 Eliz. c. 13.

§ 4.

The forcible abduction or stealing and carrying away of any person is greatly aggravated by sending them away from their own country into another, properly called kidnapping; though the punishment at common law is no more than fine, imprisonment, and pillory. In every view it is an offence of primary magnitude, and might well have been substituted upon the roll of capital crimes in the place of many others which are there to be found. By the habeas corpus act (s. 12.) "for preventing illegal imprisonments in "prisons beyond seas," it is enacted, "That no subject of "this realm, who shall be an inhabitant or resiant of this "kingdom of England, dominion of Wales, or town of "Berwick upon Tweed, shall be sent prisoner into Scotland, "Ireland,

Kidnapping by sending to foreign countries.

4 Blac. Com. 219.

31 Car. 2. c. 2. s. 12.

Sending prisoners beyond sea.

Ch. IX. § 4. *Kidnapping by sending to foreign countries.*

" Ireland, Jersey, Guernsey, Tangier, or into ports, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal; and that if any of the said subjects shall be so imprisoned, every such person and persons so imprisoned, shall and may, for every such imprisonment maintain, by virtue of this act, an action or actions of false imprisonment, in any of his majesty's courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal, or countersign any warrant or writing for such commitment, detainer, imprisonment, or transportation, or shall be advising, aiding, or assisting in the same, or any of them; and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages; which damages so to be given shall not be less than 500*l.*; in which action no delay, stay, or stop of proceeding by rule, order, or command, nor no injunction, protection, or privilege whatsoever, nor any more than one imparlance, shall be allowed; excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary, for special cause to be expressed in the said rule. And the person or persons who shall knowingly frame, contrive, write, seal, or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons contrary to this act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures of a præmunire, and be incapable of any pardon from the king, &c. of the said forfeitures, losses, or disabilities, or any of them:" (with an exception, (amongst others,) of offenders sent to be tried

Ch. IX. § 5. *Kidnapping by sending to foreign countries.*

Limitation of time.

where their offences were committed, and where they ought to be tried). By s. 17. "No person shall be sued or troubled for any offence against the act, unless within two "years after the offence committed, in case the party grieved "shall not be then in prison; and if he shall be in prison "then within two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall "first happen."

§ 5. *Masters of ships forcing or wilfully leaving persons on shore in foreign countries.* 11 & 12 W. 3. c. 7. s. 18. made perpetual by 6 G. 1. c. 19.

Also by stat. 11 & 12 W. 3. c. 7. s. 18. "If any master "of a merchant ship or vessel shall during his being abroad "force any man on shore, or wilfully leave him behind, in "any of his majesty's plantations or elsewhere, or shall refuse "to bring home with him again all such of the men whom "he carried out with him, as are in a condition to return, "when he shall be ready to proceed in his homeward-bound "voyage; every such master shall, being thereof legally "convicted, suffer three months imprisonment without bail "or mainprize."

CHAP. X.

RAPE,
AND THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

Rape.

The carnal Knowledge of a Woman by Force and againſt her Will. - - - § 1.
How puniſhable at common Law. *ib.*
How by Stat. 3 Ed. 1. c. 13. 13 Ed. 1. ſt. 1. c. 34. and 18 Eliz. c. 7. Felony without Clergy. *ib.*

Abuſe of Female Children under 10 *Years of Age, by carnal Knowledge,*

Felony without Clergy by Stat. 18 Eliz. c. 7. *ib.*
Conſent not material under that Statute. § 2.
If above 10 and under 12, carnal Knowledge with Conſent is a Miſdemeanor. *ib.*
Carnal Knowledge, how proved. - - § 3.
Attempt to raviſh, a Miſdemeanor. - - § 4.
Witneſs, where Party grieved is of tender Years. § 5.
Cannot be heard without Oath. *ib.*
Qu. Whether her Declarations recently after the Fact, confirmatory Evidence? *ib.*
A Wife is competent to give Evidence againſt her Huſband for aiding another. - - § 6.
What is proper *collateral or confirmatory Evidence.* § 7.
Principals and Acceſſaries. - - § 8.
A Boy under 14 preſumed incapable. *ib.*
So a Huſband cannot by Law be guilty of raviſhing his Wife. *ib.*
But either may be charged for aiding others. *ib.*
There may be Acceſſaries before and after. *ib.*
Indictment and Appeal. - - - § 9.
Appellant muſt make freſh Diſcovery and Purſuit. *ib.* Muſt proſecute ſpeedily. *ib.* Muſt not have conſented even after. *ib.* Such Conſent puniſhable by Stat. 6 Ric. 2. ſt. 1. c. 6. *ib.*

Appeal given by that Statute to Huſband, Father, or next of Kin. - - - § 9.
Form of the Count. - - - § 10.
It muſt be *rapuit:* but qu. *carnaliter cognovit.* ib.
Appeal muſt be contra formam Statuti. *ib.*
Qu. as to Indictment for Rape. *ib.* But certainly in caſe of Indictments on Stat. 18 Eliz. *ib.*
Indictment on Stat. 18 Eliz. muſt purſue the Words of it. *ib.*
Huſband muſt join in Appeal. *ib.* Ne unques accouplez, &c. a good Plea. *ib.*
Count by next of Kin muſt ſhew in what Manner he is ſo. *ib.*
Trial in proper County. - - - § 11.
Pardon muſt ſpecify the Offence. *ib.*

Rape, and the unlawful carnal Knowledge of Female Children.

THESE offences of which I propoſe to treat are blended together in their nature, and are put on the ſame foot by ſtatute: I ſhall therefore conſider, 1. The ſtatutes relating to the nature and puniſhment of theſe offences: and herein, as to the age of conſent of female children. 2. What is carnal knowledge, or the evidentia facti. 3. Of the teſtimony of the party grieved when of tender years. 4. What collateral circumſtances are material to be given in evidence. 5. Of principals and acceſſaries. 6. Of the indictment and appeal.

§ 1. *Definition of rape.* 1 Inſt. f. 190. 2 Inſt. 180. 433. 1 Hale, 627, 8. 631. 1 Hawk. ch. 41. f. 1. 7. 4 Blac. Com. 210—212. *How puniſhable at common law, and by ſtatute.*

Rape is the unlawful carnal knowledge of a woman by force and againſt her will. It was anciently a felony and puniſhed with death; in lieu of which William I. ſubſtituted caſtration and the loſs of eyes: but that was done away by the ſtat. of Weſtminſter 1. (3 Ed. 1. c. 13.) which enacts, "that none do raviſh nor take away by force any maiden "within age, (agreed on all hands to be twelve,) neither by "her own conſent nor without, nor any wife or maiden of "full age, nor any other woman againſt her will: and if "any do, at his ſuit that will ſue within forty days, the king "ſhall do common right: and if none commence his ſuit "within forty days, the king ſhall ſue: and ſuch as be

"found

Ch. X. § 1. *Definition of rape.*

"found culpable ſhall have two years impriſonment, and "fine at the king's pleaſure; and if they have not whereof, "they ſhall be puniſhed by longer impriſonment, according "as the treſpaſs requireth." Soon after by the ſtat. of Weſtminſter 2. rape was again made felony. "It is pro- "vided, that if a man do raviſh a woman, married, maid, "or other, where ſhe did not conſent neither before nor "after, he ſhall have judgment of life and of member. "And likewiſe where a man raviſheth a woman married, "lady, damſel, or other, with force (*a*), although ſhe con- "ſent after, he ſhall have ſuch judgment as before ſaid, "if he be attainted at the king's ſuit; and there the king "ſhall have the ſuit."

13 Ed. 1. ſt. 1. c. 34.

By ſt. 18 Eliz. c. 7. "If any perſon or perſons ſhall commit "or do any manner of felonious rape, and be found guilty by "verdict, or be outlawed, or upon arraignment ſhall confeſs "the ſame, they ſhall ſuffer death and forfeit as in caſes of "felony without benefit of clergy. And by ſtat. 3 W. & M. c. 9. ſ. 2. clergy is alſo taken away from ſuch as "ſtand mute, or will not anſwer directly to the felony, or "ſhall challenge peremptorily above twenty of the jury, or "ſhall be outlawed thereupon." Theſe ſtatutes ouſt clergy in all caſes as well from the principals in rape in the firſt degree, namely, ſuch as commit the fact, as from principals in the ſecond degree, namely, thoſe who are preſent, aiding and aſſiſting. In the caſe indeed of challenging more than the proper number, the only conſequence at this day is, that the challenge ſhall be over-ruled. But acceſſaries before and after in rape have their clergy.

18 Eliz. c. 7. *clergy.*

3 W. & M. c. 9.

2 Hale, 345.

1 Hale, 633.

Further, it having been doubted whether a rape could be committed upon a female child under ten years of age, the ſtat. 18 Eliz. c. 7. ſ. 4., "for a plain declaration of the "law," enacts, "that if any perſon ſhall unlawfully and "carnally know and abuſe any woman child under the age "of ten years, every ſuch unlawful and carnal knowledge

Rape of children. 1 Hale, 630, 1. Dy. 303. b. M. 13 & 14 Eliz. ſt. 18 Eliz. c. 7. ſ. 4.

(*a*) This diſtinction between a rape and a rape *by force* appears to be founded on a difference which once prevailed between what (in the old French law) was called the *rape* and the *viol*. The firſt of theſe was only the ſeduction of a ward with intent to marry her, which was a miſdemeanor. The *viol* was what is now underſtood by a *rape*, and was always a capital offence. Barrington on the Statutes, ch. 34. p. 139.

Ch. X. § 1. *Of children.*

"shall be felony; and the offender thereof being duly con-
"victed shall suffer as a felon, without benefit of clergy."

§ 2. *Consent.* 2 MS. Sum. 334, 5. 1 Hawk. ch. 41. f. 5. 3 Inst. 60. 1 Hale, 631.

This last-mentioned offence however is not properly speaking a rape, which implies a carnal knowledge against the will of the party; but a felony created by this statute, under which the consent or non-consent of the child, under the age of ten years, is immaterial. Lord Hale indeed thinks that if the child be above 10 and under 12, it is still rape, though she consent; 12 being the age of consent of a female; and because the stat. of Westm. 1. c. 13. refers to that period, as Lord Coke agrees. But the contrary opinion has in general prevailed, and is even adopted by Lord Hale himself in his Summary. And with this the later practice accords. For it is now holden, that if the child be above 10, it is not a felonious rape unless it be against her will and consent: and in that case it remains a rape, though she afterwards consented to the ravisher. The age of 12 in a woman is indeed the age of consenting to a marriage, and the period to which the stat. of Westm. 1. c. 13. refers by the words, "within "age." But by that statute the deflowering a child above 10 years old and under 12, if with her own consent, is made only a misdemeanor; for the stat. of Westm. 2., which restored rape to the crime of felony, does not extend to this case: and the stat. 18 Eliz. c. 7., which excludes rape from the benefit of clergy, makes no provision against the deflowering children with their own consent, but only where the children so abused are under 10 years of age. As to those who are above 10 and under 12, it leaves the offence as it stood before upon the stat. of Westm. 1. i. e. a misdemeanor only, if done with the party's consent.

2 Inst. 180. 3 Inst. 60. 4 Blac. Com. 212. 1 Hawk. ch. 41. f. 4-7. Sum. 118.

2. *Evidentia Facti.*

§ 3. *Carnal knowledge or the evidentia facti.*

A very considerable doubt having arisen as to what shall be considered sufficient evidence of the actual commission of this offence, it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honour and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further inquiry were unneces-

Ch. X. § 3. *Evidentia facti.*

ſary after ſatisfactory proof of the violence having been perpetrated by actual penetration of the unhappy ſufferer's body. The quick ſenſe of honour, the pride of virtue, which nature, to render the ſex amiable, hath implanted in the female heart, as Mr. Juſtice Foſter has expreſſed himſelf, is already violated paſt redemption, and the injurious conſequences to ſociety are in every reſpect complete. Upon what principle and for what rational purpoſe any further inveſtigation came to be ſuppoſed neceſſary, the books which record the dicta to that effect do not furniſh a trace. Nothing further therefore remains than to detail the ſeveral authorities purſuant to the object of this treatiſe.

Foſt. 274.

Lord Coke, defining "*carnal knowledge*," ſays, there muſt be penetratio, that is, res in re; but the leaſt penetration maketh it carnal knowledge. Emiſſio ſeminis makes it not ſodomy, but is an evidence in that caſe of penetration: and ſo in rape, the words are alſo *carnaliter cognovit*, and therefore there muſt be penetration; and emiſſio ſeminis without penetration makes not rape. But in the 12 Rep. 37. the ſame author ſays, that there muſt be penetratio et emiſſio ſeminis to make rape or ſodomy: and Lord Hale's Summary and Hawkins are to the ſame purpoſe: to which the latter adds, that emiſſion is ſaid primâ facie to be an evidence of penetration. Theſe again are contradicted by Lord Hale himſelf in his more enlarged and correct work, who ſays, that to make rape there muſt be an actual penetration or res in re; and therefore emiſſio ſeminis is indeed an evidence of penetration, but ſimply of itſelf it makes neither rape nor ſodomy, but is only an attempt, &c. But the leaſt penetration makes it rape or ſodomy, although there be not emiſſio ſeminis; and therefore he ſuppoſes the caſe in 12 Co. 37., which ſays there muſt be both, is miſtaken; and that it contradicts what Lord Coke ſays in his Pleas of the Crown.

3 Inſt. 59, 60.

Sum. 117. 1 Hawk. ch. 4. ſ. 2. ch. 41. ſ. 1.

1 Hale, 628.

In John Duffin's caſe for ſodomy, a ſpecial verdict found penetration, but the emiſſion out of the body. Pratt Ch. J., Blencowe, Tracy, Dormer, Forteſcue, and Page, held both to be neceſſary: e contra King Ch. J., the Chief Baron Powis, Price, Eyre, and Montague, thought that penetration was neceſſary, but not injectio ſeminis. Injection, they ſaid, cannot be proved in the caſe of a child, or of beſtiality, and

Duffin's caſe, O. B. 27th June 1721. (Qu. Dec. 1722.) Baron Price's MS.

Ch. X. § 3. *Evidentia facti.*

(352.)

penetration may be evidence of emiſſion; and Stafford's caſe Co. Entr. takes no notice of emiſſion; and there is a difference between 3 Inſt. 58. and 12 Co. 37. which was a poſthumous work. The Judges being divided, it was propoſed to diſcharge the ſpecial verdict, and indict the party for a miſdemeanor.

Cave's caſe, O.B. Oct. 1747, Serjt. Foſter's MS.

MS. ſupra.

Mathew Cave was indicted for a rape on Martha Flanders, and penetration was proved; but for want of the other proof Willes C. J. directed him to be acquitted. Of this caſe Mr. Juſtice Foſter was informed at the Old Bailey, where he ſat upon a like offence; but he held it otherwiſe, and ſaid he always ſhould do ſo, agreeably to Lord Hale. And

R. v. Blomfield, Thetford, March 1758, MS. ſup.

Clive J. did the ſame upon an indictment againſt Blomfield for a rape on Elizabeth Reynolds.

Rex v. Sheridan, O. B. 8 G. 3. 2 MS. Sum. 333.

At the ſeſſions before Eaſter term 8 Geo. 3. Sheridan was indicted for a rape on M. Brickenſhaw. The proſecutrix could not prove any emiſſion; but Mr. Juſtice Bathurſt who tried the priſoner left it to the jury to find the caſe ſpecially, if they had any doubts: but if they believed that the defendant had his will of her, and did not leave her till he choſe it himſelf, then he directed them to find him guilty, though an emiſſion were not proved. The jury convicted him. Mr. Juſtice Bathurſt afterwards ſaid, that it was always his opinion that it was not neceſſary to prove emiſſion; and Baron Smythe who was preſent at the trial was clearly of the ſame opinion.

R. v. Ruſſen, O.B. Oct. 1777. Serjt. Forſter's MS.

Benjamin Ruſſen was maſter of a charity-ſchool, and was charged with two forceable rapes on Ann Mayne, one of the girls of the ſaid ſchool; the firſt fact being juſt before, the other juſt after ſhe attained her age of 10 years. The child ſwore to a full proof in both reſpects, and her teſtimony was corroborated by marks obſerved on her linen at the time, but ſhe was deterred by the priſoner's threats from making any diſcovery till three or four months after the time. For the priſoner it was proved by two ſurgeons, whoſe teſtimony was corroborated by four others who had examined the child, that the paſſage of the parts was ſo narrow that a finger could not be introduced; and that the membrane called the Hymen which croſſes the Vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; ſo that ſhe could never have been completely known by man.

But

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But as this membrane was admitted to be in ſome ſubjects an inch, in others an inch and an half beyond the orifice of the vagina, Aſhhurſt J. who tried the priſoner left it to the jury whether any penetration were proved; for if there were any, however ſmall, the rape was complete in law. The jury found him guilty, and he received judgment of death. But before the time of execution, the matter being much diſcuſſed, the learned Judge reported the caſe to the other judges for their opinions, whether his direction were proper. And upon a conference it was unanimouſly agreed by all aſſembled, (in the abſence of De Grey Ch. J. and Eyre B.) that the direction of the Judge was perfectly right. They held, that in ſuch caſes the leaſt degree of penetration is ſufficient, though it may not be attended with the deprivation of the marks of virginity. It was therefore properly left to the jury by the Judge, and accordingly the priſoner was executed.

Vide Earl's caſe, O.B. Dec. 1770.

At this period the weight of authorities was ſuppoſed to be much againſt the neceſſity of the two proofs.

Samuel Hill's caſe, Tr. term 1781, MS. Gould and Buller Js.

But in Hill's caſe, who was tried before Buller J. at the ſpring aſſizes at Lincoln 1781, for a rape on Mary Portas, a caſe was reſerved for the opinion of the judges, ſtating, that the fact of penetration was poſitively ſworn to, but there was no direct evidence of emiſſion, and from interruption it appeared probable that it was not effected. The learned Judge told the jury, that if they were ſatisfied there was an actual penetration, though there were no emiſſion, they ought to find the priſoner guilty: but he deſired they would conſider the two facts ſeparately, and give their opinions diſtinctly upon each. The jury found the priſoner guilty, but ſaid they did not find the emiſſion; whereupon ſentence was reſpited till the next aſſizes. In Trinity term Lord Loughborough, Buller, and Heath, Js. held that the offence was complete by penetration only. Lord Ch. B. Skynner, Gould, Willes, Aſhhurſt, and Nares, Js. and Eyre and Hotham, Bs. held both were neceſſary, but thought that the fact ſhould be left to the jury. Perryn B. was abſent; and Lord Mansfield only ſaid, that a great majority ſeemed to be of opinion that both were neceſſary. The majority there went on the ground that carnal knowledge (which they conſidered could not exiſt without emiſſion) was neceſſary to the conſummation of the offence. The others denied that definition; and alſo obſerved

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that carnal knowledge was not neceſſary to be laid in the indictment, but only that the defendant raviſhed the party (*a*).

As to what may be conſidered as proof of emiſſion, ſuppoſing it to be neceſſary, it ſeems from what was ſaid by the judges in the laſtmentioned caſe, and from Mr. Juſtice Bathurſt's opinion in Sheridan's caſe, that the fact of penetration is primâ facie evidence of it, unleſs the contrary appear probable from the circumſtances: and Hawkins is expreſs to that purpoſe. So where upon an indictment for an aſſault with intent to raviſh the proſecutrix, ſhe ſwore that the defendant had had his will with her, and had remained on her body as long as he pleaſed; though ſhe could not ſpeak as to emiſſion; Buller J. ſaid, this was ſufficient evidence to be left to a jury of an actual rape; and therefore ordered the defendant to be acquitted upon the preſent charge. He ſaid, that he recollected a caſe where a man had been indicted for a rape, and the woman had ſworn that ſhe did not perceive any thing come from him; but ſhe had had many children, and was never in her life ſenſible of emiſſion from a man: and that was ruled not to invalidate the evidence which ſhe gave of a rape having been committed upon her.

Ante, p. 438.

1 Hawk. ch. 4. ſ. 2.

Harmwood's caſe, Wincheſter Sp. Aſſ. 1787, MS.

In the caſe of Flemming and Windham, the depoſition of the party injured (who had died in the mean time) taken before a magiſtrate on oath in the uſual courſe upon the examination of the priſoners, was read in evidence againſt them, containing a general allegation of the charge; and this being corroborated by other evidence of the actual force and penetration, was holden ſufficient to warrant a conviction; though, as it is ſtated, there was no direct evidence of emiſſion.

Rex v. Flemming and Windham, before the judges in Trin. term 1799. 2 Leach, 996.

§ 4. *Indictment for an attempt to raviſh.*

But though in ſome caſes there may be a defect of evidence as to the completion of the offence in reſpect of one of the circumſtances above alluded to, yet if in all other reſpects the injury be ſatisfactorily proved, it muſt in any real eſtimate of guilt be conſidered to be full as aggravated an offence as that which in the ſtricteſt notion of law is denominated rape; and though the puniſhment of it as a miſdemeanor for the attempt to commit a rape be not ſo highly penal as under

(*a*) *Vide* ante, 437. and poſt. p. 448. Lord Coke and Lord Hale, though they hold it neceſſary to lay *carnal knowledge* in the indictment, conſider penetration alone as ſufficient to conſtitute it.

the

the before-mentioned ſtatutes, which reach the offender's life, yet ſome inſtances of this ſort have been puniſhed in an exemplary manner by fine, impriſonment, and pillory, and finding ſureties for good behaviour for life. Though this latter part of the ſentence is not conſonant to the practice of our preſent conſtitution, in the apportionment of diſcretionary puniſhment, as tending to an impriſonment for life.

Ch. X. § 4. *Attempt to raviſh.*

Page's caſe, Cro. Car. 332.

3. *As to the Teſtimony of the Party grieved.*

§ 5. *Witneſſes.*

If the rape be charged to be committed on an infant under 12 years of age, ſhe may ſtill be ſworn if ſhe have ſenſe enough to know the nature and obligation of an oath. But if it be an infant of ſuch tender age that in point of diſcretion the court ſees it unfit to ſwear her, yet Lord Hale was of opinion that ſhe ought to be heard without oath to give the court information; though ſingly of itſelf it ought not to move the jury to convict the offender; nor was in itſelf ſufficient teſtimony, becauſe not upon oath, without the concurrence of other proofs that might render the thing probable. And his reaſons for the hearing of ſuch an infant, though not upon oath, are, firſt, the nature of the offence, which is for the moſt part ſecret; and no other teſtimony can be had of the fact itſelf, though there may be other concurrent proofs. Next, becauſe if the child complain preſently of the wrong done to her to the mother or other relations, their evidence upon oath ſhall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reaſon for the court to hear the relation of the child herſelf, than to receive it at ſecond hand from thoſe who ſwear they heard her ſay ſo; for ſuch a relation may be falſified or repreſented otherwiſe at ſecond hand than when it was firſt delivered. And indeed, adds Mr. Juſtice Blackſtone, it ſeems now to be ſettled that in theſe caſes infants of any age are to be heard; and if they have any idea of an oath, to be alſo ſworn. But both authors agree, that in any of theſe caſes, whether the child be ſworn or not, it is to be wiſhed in order to render her evidence credible, that there ſhould be ſome concurrent teſtimony of time, place, and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion.

1 Hale, 302. 634. 2 Hale, 279. 284.

4 Black. Com. 214.

A child

Ch. X. § 5. *Witneſs.*

A child of ſeven years old was admitted to give evidence of a rape, and on her evidence and that of ſurgeons and midwives, the defendant was convicted and hanged. But ſuch evidence was refuſed by Parker C. B. on an indictment for a rape on Grace Howel (*a*).

Dy. 303. b. in margin.
(*a*) R. v. Termont, O. B. 1740, Serjt. Forſter's MS. 182.
(*b*) O. B. Mich. 1705, MS. Denton.
(*c*) Young v. Slaughterford, Trin. 1709.
Rex v. Travers, 3 Stra. 700.

One about nine (*b*) was admitted to prove a rape on herſelf by Holt Ch. J. Another of 10 years and 11 months by Holt C. J. and Tracy, April 1704. And another (*c*) under 12 was admitted in B. R. upon an appeal.

In Travers's caſe at Kingſton ſummer aſſizes 1726, Lord Ch. B. Gilbert refuſed the teſtimony of a child little more than ſix years old againſt the defendant for a rape on her, becauſe ſhe was too young to diſtinguiſh between right and wrong. At the next aſſizes the defendant was indicted for the aſſault with intent to raviſh: and it was urged for the admiſſion of the child's evidence, that though it might be refuſed in a capital caſe, yet in a miſdemeanor it might be admitted. But Raymond Ch. J. held there was no difference between capital and leſſer offences; and ſaid, that no perſon had ever been admitted as a witneſs under nine years, and very ſeldom under ten. That this point was thoroughly debated at the Old Bailey in 1704, in the caſe of one Stewart, upon two indictments for rapes upon children: the firſt was upon a child of ten years and ten months; yet even that child was not admitted till after other evidence had been given of ſtrong circumſtances againſt the priſoner, and after the child had given a good account of an oath; and it was merely upon the authority of Lord Hale, who ſays, that a child of ten years old may be a witneſs, that this child was admitted at all. The ſecond indictment was attempted to be proved by a child only between ſix and ſeven years old; but this was unanimouſly rejected without inquiring into any circumſtances to give it credit. Lord Raymond therefore refuſed in the caſe before him to receive the child's evidence, and the defendant was acquitted.

Rex v. Dunnel, Norwich aſſizes, 29th July 1771, Serjt. Forſter's MS.

The defendant was indicted for a rape on Iſabella Kedmunds, alias Hadman, a child of eight years old. At the trial ſhe was called, being then nine years and four months, to prove the priſoner's behaviour to her. On being objected to, De Grey C. J. ſaid, the univerſal practice now was, that a child under nine years of age could not be examined as a witneſs

witneſs either upon or without oath in a capital caſe, a miſdemeanor, or any caſe whatever. And that if a child were between nine and fourteen, it was diſcretionary in the court to admit the evidence of ſuch child or not according to the child's underſtanding, but not unleſs the child could give a good account of an oath; but thoſe above fourteen were examined of courſe. In this caſe the child being very ſenſible was examined: but the defendant was upon full evidence acquitted. He was afterwards indicted for an aſſault with intent to raviſh, and acquitted alſo of that.

Brazier's caſe, Reading Sp. Aſſ. 1779, MS. Gould and Buller Js. *vide* S.C. 1 Leach, 237. amended from the former edition. Rex v. Powell, cor. Gould J. at York 1775, 1 Leach, 128. S. P.

The laſt caſe which has occurred on this doubtful ſubject is that of William Brazier, who was tried for aſſaulting Mary Harris, an infant of five years old, with intent to raviſh her. The caſe on the part of the proſecution was proved *by the mother of the child and another woman* who lodged with her, to whom the child immediately on her coming home told all the circumſtances of the injury done to her, and deſcribed the priſoner, who was a ſoldier, as the perſon who had committed it; but ſhe did not know his name. The next day the priſoner was called from the guard by the ſerjeant, and ſhewn to the child, who immediately ſaid that was the man. Two other ſoldiers had been before ſhewn to her, of whom ſhe at once denied any knowledge. There was no fact or circumſtance to confirm the account given by the girl that the priſoner was the man who committed the offence, except that he lodged where ſhe deſcribed. That ſhe had received ſome hurt was proved by a ſurgeon as well as by the two women. The child was coming from ſchool when the priſoner attacked her. The ſchool did not break up till four o'clock, and ſhe was at home before five, and had no converſation or communication with the mother before ſhe had told all that had paſſed. The priſoner was convicted. But Mr. Juſtice Buller reſerved the above ſtatement of facts for the opinion of the judges, whether this evidence ought to have been received, or was ſufficient in point of law to be left to the jury. On the firſt day of Eaſter term 1779 the judges met on this ſubject, when all of them except Gould and Willes Js. held that this evidence of the information of the child ought not to have been received, as ſhe herſelf was not heard on oath: as to which ſome, particularly Blackſtone, Nares, Eyre, and Buller Js. thought that if ſhe had appeared

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peared on examination to have been capable of diſtinguiſhing between good and evil, ſhe might have been ſworn. But as to that, others, particularly Gould and Willes Js. held that the preſumption of law of want of diſcretion under the age of ſeven is concluſive; ſo as not to admit an infant under that age to be ſworn on any examination as to her capacity. And as to the information or narration from the child, Gould and Willes Js. held that it being recently after the fact, ſo that it excluded a poſſibility of practiſing on her, it was a part of the fact or tranſaction itſelf, and therefore admiſſible: and Buller J. held the ſame, if by law the child could not be examined on oath. But as to what happened the next day, Gould J. thought it not admiſſible, by reaſon of the danger of her being influenced in the interval. But on the 29th April all the judges being aſſembled, they unanimouſly agreed that a child of any age, if ſhe were capable of diſtinguiſhing between good and evil, might be examined on oath; and conſequently that evidence of what ſhe had ſaid ought not to have been received. And that a child of whatever age cannot be examined unleſs ſworn. The priſoner was pardoned.

It does not however appear to have been denied by any in the above caſe, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence.

§ 6. *Wife againſt huſband.* Ld. Caſtlehaven's caſe, 1 Hale, 629. 12 Mod. 340. 454. *vide* general title Witneſs. Ld. Audley's caſe, Hutt. 116. 1 St. Tr. 387. 1 St. Tr. 633.

The party grieved is ſo much conſidered as a witneſs of neceſſity in this as in other perſonal injuries, that in Lord Caſtlehaven's caſe, who aſſiſted another man in raviſhing his own wife, ſhe was admitted as a witneſs againſt him. The ſame teſtimony was received in Lord Audley's caſe.

4. *As to what collateral Facts are material to be given in Evidence.*

§ 7. *Collateral evidence in confirmation or otherwiſe.* 1 Hale, 628. 631. 1 Hawk. ch. 41. ſ. 2. 4 Blac. Com. 213. 2 MS. Sum. 333. Cro. Car. 485.

It is no mitigation of this offence that the woman at laſt yielded to the violence, if ſuch her conſent were forced by fear of death or by dureſs. Nor is it any excuſe for the party indicted that the woman conſented after the fact; nor that ſhe was a common ſtrumpet; for ſhe is ſtill under the protection of the law, and may not be forced: nor that ſhe was firſt taken with her own conſent, if ſhe were afterwards forced

forced againſt her will; nor that ſhe was a concubine to the raviſher; for a woman may forſake her unlawful courſe of life, and the law will not preſume her incapable of amendment. All theſe latter circumſtances, however, are material to be left to the jury in favour of the party accuſed, more eſpecially in doubtful caſes, and where the woman's teſtimony is not corroborated by other evidence.

Ch. X. § 7. *Confirmatory evidence.*

It was formerly ſuppoſed that if a womman conceived it was no rape, becauſe that ſhewed her conſent; but it is now admitted on all hands that ſuch an opinion has no ſort of foundation either in reaſon or law.

1 Hawk. ch. 41. ſ. 2. 1 Hale, 631. 2 MS. Sam. 334.

Upon the trial of this offence, the caution of a great and very experienced judge is ever to be kept in mind. It is true, ſays Ld. Hale, rape is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death: but it muſt be remembered that it is an accuſation eaſily to be made, and hard to be proved; and harder to be defended by the party accuſed, though ever ſo innocent. And therefore, ſays he, though the party raviſhed be in law a competent witneſs, yet the credibility of her teſtimony muſt be left to the jury upon the circumſtances of fact that concur with that teſtimony. And theſe rules have been laid down as ſome guides to the diſcovery of the truth; for inſtance, if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made purſuit after the offender; if ſhe ſhewed circumſtances and ſigns of the injury, whereof many are of that nature that only women are proper examiners; if the place where the fact was done were remote from inhabitants or paſſengers; if the offender fled for it; theſe and the like are concurring circumſtances which give greater probability to her evidence. On the other hand, if ſhe be of evil fame and ſtand unſupported by other evidence; if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain; not, as in Ruſſen's caſe, where the girl had continued for three or four months under the priſoner's immediate control without complaining, through fear of him: again, if the place where the fact was ſuppoſed to be committed were near to perſons by whom it was probable ſhe might have been heard, and yet ſhe made no outcry; if ſhe gave wrong deſcriptions of the place; if ſhe fixed on a place where it was improbable for the man to have had acceſs to her by his being in a different place

1 Hale, 635.

1 Hale, 633. 4 Blac. Com. 213. 1 Hawk. ch. 41. ſ. 3. 2 MS. Sum. 335. Staundf. 22.

Ante, p. 438.

Ch. X. § 7. *Confirmatory evidence.*

place or company about that time: theſe and the like circumſtances afford a ſtrong, though not concluſive preſumption that her teſtimony is feigned.

5. *Of Principals and Acceſſaries.*

§ 8. *Principals and acceſſaries.*

2 Hale, 628, 9, 630. 1 Hawk. ch. 41. ſ. 6. 4 Blac. Com. 212. Plowd. 99, 100. Bro. Appeal, 32.

All who are preſent and aſſiſt a man to commit a rape may be indicted as principals in the ſecond degree, as well women as men. So, though a boy under fourteen years of age is preſumed to be incapable of committing this offence; and though a huſband cannot by law be guilty of raviſhing his wife, on account of the matrimonial conſent which ſhe cannot retract; yet if they aſſiſt others to commit it; as in the inſtances of Lord Caſtlehaven and Lord Audley who aſſiſted others to raviſh their own wives, they are equally guilty with the principal actors; the aſſent of the huſband being no excuſe to another. But in the caſe of an infant it muſt appear, as in other felonies, that he had a miſchievous diſcretion. So where a marriage was compelled, and carnal knowledge had by force; till ſuch marriage were legally diſſolved, though only a marriage de facto, the huſband could not be appealed of the rape. But after ſuch marriage is avoided ab initio by ſentence, the offender is puniſhable the ſame as if there had been no marriage at all. However, the ſtat. 3 H. 7. c. 2. providing a ſpecial remedy for this grievance, it is leſs material to be conſidered here.

ante, f. 6.

2 Hale, 629. Pall's caſe.

Vide poſt. ch. 11.

2 Hale, 632, 3.

There may be acceſſaries before and after in rape, though, as Lord Hale obſerves, the felony be created by act of parliament which ſpeaks only of thoſe who commit the offence; for this is incident to the nature of felony.

Ante, f. 1.

The puniſhment of theſe offenders has been before conſidered.

6. *Of the Indictment and Appeal.*

§ 9. *Indictment and appeal.*

2 Hale, 631-3. 2 Hawk. ch. 23. ſ. 58. 72. 4 Blac. Com. 211. (2 Hawk. ch. 23. ſ. 51.)

An indictment for rape may be proſecuted at any time, and notwithſtanding any ſubſequent aſſent of the party grieved. An appeal alſo lies at the ſuit of the ſame party; but there are ſeveral requiſites to the bringing of ſuch appeal: 1. That the party grieved make freſh diſcovery of the offence and purſuit of the offender, (though it be not neceſſary to raiſe hue and cry); otherwiſe it carries a preſumption that her ſuit is malicious and feigned. 2. That

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the appeal be ſpeedily proſecuted; for according to ſome opinions a year and a day is not allowed in this appeal, but ſome ſhort time. Such time however is no where defined, but is ſaid to lie in the diſcretion of the court and jury upon the circumſtances of the fact; the ſtat. however of Weſtm. 1. c. 13. which made it a miſdemeanor, allowed but forty days; and though that ſtatute be ſo far virtually repealed by the ſtatute of Weſtm. 2. c. 34. as that the offence is again made felony, and a new appeal of rape is thereby given; yet no other time being therein limited, the former period may at leaſt be taken as a meaſure to govern the diſcretion of the court, in ordinary caſes. 3. That the woman (if 12 years of age at leaſt) never once conſented to the raviſher after the fact, except by dureſs; otherwiſe her appeal is barred by the ſtat. of Weſt. 2., and in that caſe both ſhe and the raviſher are by the ſtat. 6 Ric. 2. ſt. 1. c. 6. "diſabled to challenge all inheritance, dower, or joint feoff-"ment after the death of their huſbands and anceſtors:" but it ſhall go over to the perſon next entitled. Alſo by the laſtmentioned ſtatute "the huſband of the party injured, "if ſhe have any, or if not, then the father or other next "of her blood, ſhall have the ſuit to purſue againſt the "raviſhers, and to have them thereof convict of life and "member; although the woman after ſuch rape conſented "to the raviſhers." And the defendant ſhall not in this caſe wage battle. If a woman who has neither huſband nor father be raviſhed by her next of kin, and ſo conſent to him, the next of kin after him ſhall have the appeal.

Supra, and 3 MS. Sum. 10. ante, p. 434.

Ante, p. 435.

6 Ric. 2. ſt. 1. c. 6. 1 Hale, 631.

§ 10. *Form of the count.*

The indictment and appeal muſt ſtate that the defendant felonioufly *raviſhed*, &c.; nor can that word be ſupplied by an averment that he *carnally knew*, &c. And theſe latter words have been holden not to be neceſſary in appeals (*a*), becauſe (as the reaſon is given in the original caſe in the year-book,) if the defendant raviſhed and had not carnal knowledge (1), it would not be felony, but treſpaſs; a reaſon which ſeems to be grounded as much upon the word felonice as rapuit (2); and upon which Staundford citing the ſame caſe obſerves that it is an inſtance in felony of a count holden good by implication. If this be ſufficient in an appeal,

1 Inſt. f. 190. 2 Inſt. 180. 1 Hale, 628. 2 Hale, 184. Bro. Abr. Indictment, pl. 7. 9 Ed. 4. 26. Staundf. 96. Pult. de pace, 126.

(*a*) 11 H. 4. 13. cited in Bro. Appeal, 32. Fitz. Coron. pl. 86. 2 Hawk. ch. 23. ſ. 79. Sum. 187. & Staundf. 81.

(1) *Vide* ante, p. 435. (2) *Vide* 2 Hale, 172.

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peal, there is no reaſon why it ſhould not be equally good in an indictment; and accordingly Hawkins (*b*), upon the authority of the ſame caſe, ſays, that in an indictment as well as in an appeal of rape the fact ſeems to be ſufficiently aſcertained by the words felonice rapuit, without adding carnaliter cognovit; or, as he adds, by firſt ſetting forth the ſpecial manner of the terror or violence, and then concluding that the defendant *ſic felonice rapuit*. But notwithſtanding theſe authorities it may not perhaps be ſafe to omit the averment of carnal knowledge in the indictment. For the authority for ſuch omiſſion reſts ſolely upon the caſe in the year-book 11 H. 4. 13., to which all the other books refer; and the reaſon there given is not a very ſatisfactory one, on the account before ſuggeſted by Staundford; nor is it ſupported by the current of precedents, which, as far as I have obſerved, contain that averment. On the contrary, both Lord Hale and Lord Coke ſay, that the indictment ought to be *rapuit, et carnaliter cognovit*; though the latter ſays in another place (*a*) that *rapere* legally ſignifies as much as *carnaliter cognoſcere*; which, if that were admitted, would ſhew that the latter allegation was unneceſſary, being in effect a repetition of the other. The appeal of rape muſt conclude contrà formam ſtatuti; and Lord Hale ſays the ſame of the indictment; founded upon the 6 H 7. 5.: but that caſe, which is in other reſpects queſtionable, proceeds on the miſtaken notion that rape was only a treſpaſs at common law, and was firſt made felony by the ſtat. of Weſtm. 2. But inaſmuch as that ſtatute did not create the offence, but only enhanced the penalty; or to ſpeak more correctly, by repealing in effect the ſtat. of Weſtm. 1. which reduced the offence to a miſdemeanor, thereby reſtored the common law; ſuch a concluſion ſeems to be unneceſſary: however, the uſual form of indictment is ſo to conclude. But if the indictment be upon the ſtat. 18 Eliz. for deflowering a child under ten years of age, with her conſent, it ſeems neceſſary to conclude againſt the form of the ſtatute; becauſe the crime as well as the puniſhment is created by that ſtatute. And on the ſame account it is neceſſary for the indictment to purſue the words of the act, and charge that the defendant felonioufly, unlawfully, and carnally knew and abuſed the party, being under the age of ten years, without adding the word *raviſhed*, for the reaſon before ſtated.

(*b*) 2 Hawk. ch. 25. ſ. 56.

2 Hale, 632. 8, 9. Sum. 117.

3 Inſt. 60. et *vide* Co. Lit. 137.

2 MS. Sum. 336. accord.

(*a*) 2 Inſt. 180.

2 Hawk. ch. 23. ſ. 6.

2 MS. Sum. 336.

3 MS. Sum. 334—6.

Ante, ſ. 2.

Neither

Neither at common law nor by ſtatute can a married woman bring an appeal of rape without her huſband; but it has been holden a good plea on the ſtatute of Ric. 2. that he was not lawful huſband, which is triable by the biſhop's certificate. Alſo in an appeal by the next of kin, the count muſt ſtate ſpecially in what manner he is ſo. And it ſeems neceſſary either to rehearſe the ſtatute, or at leaſt to allege that the woman conſented to the raviſher afterwards, and conclude that the rape was againſt the form of the ſtatute.

Ch. X. § 10. *Appeal.*

2 Hawk. ch. 23. ſ. 58, 61, 3. 67. 70.

The trial muſt be in the county where the fact was committed: and by ſtat. 13 Ric. 2. ſt. 2. c. 1. no charter of pardon ſhall be allowed for rape, unleſs it be therein ſpecified.

§ 11. *Trial.*

Ib. ſ. 71. *Pardon.*

CHAP. XI.

OF FORCIBLE, OR FRAUDULENT ABDUCTION, MARRIAGE, OR DEFILEMENT.

1. *Of forcible Abduction, Marriage, or Defilement of Women of Subſtance.* - §1.

Stat. 3 H. 7. c. 2. makes the Miſdoers, Procurers, and Receivers of the Woman principal Felons. *ib.*

Stat. 39 Eliz. c. 9. ouſts Clergy from *Principals and Acceſſaries before.* ib.

Who ſhall be deemed ſuch within the Stat. of Eliz. §2.

Semble, Receivers of the Woman not ouſted of Clergy. *ib.*

Trial, where. - - - - §3.

Indictment and Proof. - - - §4.

Muſt ſhew what Subſtance the Woman had. *ib.*

That the *taking* was againſt her Will, and for Lucre. *ib.*

That ſhe was married or defiled. *ib.*

No *Appeal* lies. *ib.*

No Defence, that the Huſband did not authoriſe the original Force; or that the Woman conſented to it, if ſhe were afterwards forced; or that after a forcible taking ſhe conſented to Marriage or Defilement. *ib.*

Witneſs, the Party injured. - - §5.

2. *Of fraudulently alluring away Female Children, under the Age of Sixteen, from their Parents, &c.* - - - - §6.

Stat. 4 & 5 Ph. & Mary, c. 8. prohibits generally the taking away of any Woman Child, unmarried, under the Age of 16, from the Poſſeſſion, &c. and againſt the Will of the Father or deputed Guardian; though the Title and Preamble be reſtricted to Maidens Inheritors, &c. and to taking by Sleight or Force. *ib.*

Perſons above the Age of 14, ſo taking any Woman Child, puniſhable by two Years Impriſonment or Fine. *ib.*

Any Perſons ſo taking away ſuch Woman Child and deflowering her, or againſt the Will of the Father or Mother, by ſecret Letters, &c. contracting Matrimony with her, ſhall be impriſoned 5 Years or pay Fine, &c. - - - § 6.

Trial, before whom. *ib.*

A Baſtard is within the Act. - - § 7.

Qu. as to Aſſent of the Father once given, but afterwards retracted. *ib.*

Object of the Act to prevent Seduction, or ſecret Marriage, to the Diſparagement of the Party. *ib.*

Qu. as to Conſent of Perſons having a temporary and ſpecial Cuſtody. *ib.*

What is a ſufficient Cuſtody. *ib.*

B. R. has a general Juriſdiction to inquire either at common Law or on the Stat. - - § 8.

3. *Of forcible or fraudulent Procurement of Marriage.* - - - - - § 9.

At common Law, how far indictable. *ib.*

Semble, unlawful Means muſt be uſed, ſuch as Violence, Deceit, Conſpiracy, or other corrupt Practices. *ib.*

Otherwiſe bare Act of Marriage without Conſent of Parents, &c. no Offence. *ib.*

But Indictment lies generally in Caſes coming within the prohibitory Clauſe of the Stat. 4 & 5 Ph. & M. c. 8. *ib.*

The Puniſhment by Impriſonment for Raviſhment of Ward, by Stat. 13 Ed. 1. c. 35. obſolete § 10.

But Indictment at common Law for Conſpiracy to entice one to leave her Father, and live in Fornication, ſuſtained by Proof that ſhe was carried off ſecretly by her own Conſent after Solicitation to defile. *ib.*

Conſpiracy to marry Paupers. - - - § 11.

There muſt be Force, Threat, Fraud, or other corrupt Practice; otherwiſe no Miſdemeanor. *ib.* No Offence if the Parties voluntarily conſent, though Money be given by Way of Inducement. *ib.*

Indictment how to be framed. *ib.*

Ch. XI. § 1.

I. *Of the forcible Abduction, Marriage, or Defilement of Women of Subſtance.*

§ 1. *Forcible abduction of women, &c.* 3 Hen. 7. c. 2.

THE ſtat. 3 H. 7. c. 2. reciting that "where women, "as well maidens as widows and wives, having ſub- "ſtances, ſome in goods moveable, and ſome in lands and "tenements, and ſome being heirs apparent unto their an- "ceſtors, for the lucre of ſuch ſubſtances be oftentimes "taken by miſdoers, contrary to their will, and after mar- "ried to ſuch miſdoers, or to other by their aſſent, or de- "filed," enacts, "that whatever perſon or perſons from "henceforth taketh any woman, ſo againſt her will, unlaw- "fully, that is to ſay, maid, widow, or wife; ſuch taking "procuring and abetting to the ſame, and alſo receiving "wittingly the ſame woman ſo taken againſt her will, and "knowing the ſame, be felony: and that ſuch miſdoers, "takers, and procurators to the ſame, and receitors, know- "ing the ſaid offence in form aforeſaid, be adjudged prin- "cipal felons: Provided that this act extend not to any "perſon taking any woman, only claiming her as his ward "or bond-woman."

39 Eliz. c. 9. *as to clergy.*

The ſtat. 39 Eliz. c. 9. reciting the offences deſcribed in the recital of the laſt-mentioned ſtatute, and that thoſe offences had been made felony by that ſtatute, proceeds to enact, "that all and every ſuch perſon and perſons as ſhall be "convicted or attainted of any offence made felony by the "ſaid act, or who ſhall be indicted and arraigned of any "ſuch offence, and ſtand mute, or make no direct anſwer, "or ſhall challenge peremptorily above twenty, ſhall in every "ſuch caſe ſuffer death without benefit of clergy." "Pro- "vided (ſ. 2.) that nothing therein contained ſhall extend "to take away the benefit of clergy, but only from ſuch "perſon and perſons as ſhall be principals, or procurers, or "acceſſaries before."

§ 2. *Principals and acceſſaries.* 1 Hale, 661. 3 Inſt 61, 2. 2 Hawk. ch. 42. ſ. 7, 8. 2 Hawk ch. 29. ſ. 12. Sum. 115. 2 Co. 20. 100.

Not only the miſdoers themſelves, but the procurers and any who wittingly receive the woman ſo taken away are made principals by this ſtatute. But he who only receives the offender himſelf knowingly is only an acceſſary after by the rule of the common law. And though the ſtatute of Elizabeth has taken away clergy from all who ſhall be con-

victed

victed of any offence made felony by the ſtat. of Hen. 7., it ſeems doubtful, whether thoſe who receive the woman after the fact done are ouſted of clergy. Lord Hale indeed ſays, that being made principal felons by the one law, they are ouſted of clergy by the other; but he immediately adds a quære, whether they were intended to be ouſted. And by the proviſo at the end of the ſtat. of Eliz. it ſeems to be the intention of the legiſlature to ſave them from being ouſted of clergy. For though the ſtat. of Hen. 7. makes ſuch receivers principals; yet the ſtat. of Eliz. diſtinguiſhing between principals and acceſſaries before, (all of whom were made principals by the former law,) muſt be taken to mean ſuch principals as were deemed ſuch at common law. And the receiver of the woman comes more properly under the notion of an acceſſary after the fact; and as ſuch would be plainly entitled to clergy. Thoſe who are only privy to the marriage, and not to the forcible taking away, nor conſenting thereto; (which muſt at leaſt be underſtood where the woman is not under any conſtraint at the time of the marriage;) are not within the ſtatute.

Ch. XI. § 2. *Principals and acceſſaries.*

2 MS. Sum. 333. a.

Fulwood's caſe, Cro. Car. 489. 493. *Vide* poſt. 454.

If a woman be forcibly taken in one county, and afterwards go voluntarily into another county, and be there married or defiled with her own conſent, the fact is not indictable in either: for the offence, which conſiſts in the forcible taking and ſubſequent marriage or defilement, is not complete in either. But if the force continued upon her at all in the other county into which ſhe was ſo taken, the offender may be indicted there; although the actual marriage or defilement afterwards took place with her own conſent.

§ 3. *Trial—county.* Fulwood's caſe, Cro. Car. 485, 8. 1 Hale, 660. 1 Hawk. ch. 42. ſ. 9. Hob. 182. 2 MS. Sum. 332.

The indictment muſt expreſsly ſet forth that the woman taken had lands, or tenements, or goods, or was heir apparent; and that the taking was againſt her will, and for lucre; and that ſhe was either married to the miſdoer or to ſome other by his aſſent; or that ſhe was defiled, i. e. carnally known: and the proof muſt agree therewith. But it need not allege that the taking was with intent to marry or defile her; for neither the words of the ſtatute require ſuch intent, nor does the want of it leſſen the injury: though Lord Hale obſerves that it is uſual and ſafeſt to add ſuch an averment.

§ 4. *Indictment and proof.* 1 Hawk. ch. 42. ſ. 3, 4. 3 Init. 61. 1 Hale, 660. 1 And. 115. Hob. 182. Fulwood's caſe, Cro. Car. 482, 5. 1 Vent. 244. 12 Co. 20. 100. Hutt. 2. 4 Blac. Com. 208. 2 MS. Sum. 332.

Ch XI § 4. *Inſt Tuitat and proof*

No appeal lies on this ſtatute (*a*).

(*a*) Hutt 3. (*b*) 1 Hawk. ch 42. ſ. 5, 6. 2 Hale, 660. 4 Blac Com. 208. 2 MS. Sum. 372. a. Cro. Car 485. 493. Haagen Swendſen's caſe, 5 St Tr. 450. 464. 473. 4.

It is no excuſe (*b*) that the party marrying was not the author of the original force, or that the woman was firſt taken with her own conſent, if ſhe afterwards refuſed to continue with the offender, and were forced againſt her will; for from that time ſhe may properly be ſaid to be taken againſt her will. As little material is it, whether a woman ſo taken were at laſt married or defiled with or without her own conſent, if ſhe were under the force at the time of the taking; for it is equally within the words and meaning of the ſtatute, which was to protect the weaker ſex from force and fraud. And though if the marriage be againſt her will it is voidable, yet a marriage de facto is within the ſtatute.

§ 5. *Witneſs.*

2 Hale, 301. 660, 1. Fullwood's caſe, Cro Car. 488. Brown's caſe, 2 Ventr. 143. Haagen Swendſen's caſe, 5 St. Tr. 456.

A woman ſo taken away and married may without doubt be a witneſs againſt the offender, if the force were continuing upon her till the marriage; becauſe then he is no huſband de jure; and ſhe herſelf may prove ſuch continuing force: accordingly it was ſo done in Fullwood's caſe, M. 13 Car. 1., in Brown's caſe, Tr. 25 Car. 2., and in Haagen Swendſen's caſe, M. 1 Ann. Upon the ſecond of theſe Lord Hale obſerves, that there were other witneſſes who proved the taking by force, though none but the child herſelf proved the marriage to be forcible. And moſt, he adds, were of opinion that if ſhe had lived with him any conſiderable time, and aſſented to the marriage by any free cohabitation, ſhe could not have been admitted as a witneſs. This reaſoning ſeems to imply, that if the woman after her forcible abduction give her conſent to the marriage, her teſtimony could not be received: yet Mr. Juſtice Blackſtone on a review of the ſeveral authorities thinks that it ſhould even be allowed where the marriage is good by the previous conſent of the inveigled woman after her forcible abduction; adverting to the abſurdity of otherwiſe permitting the offender thus to take advantage of his own wrong. And ſurely there can be no doubt of her competency where the marriage was againſt her will at the time, notwithſtanding her ſubſequent aſſent; for if ſhe were a competent witneſs at any time after the crime committed, I know not by what rule of law her ſubſequent aſſent to the crime can incapacitate her; much leſs how by any lapſe of time ſhe can be incapacitated: however theſe circumſtances may and ought to weigh with the jury who

4 Blac. Com. 209.

who are to decide upon the credit of her teſtimony. But further, I conceive it to be now ſettled that in all caſes of perſonal injuries committed by the huſband or wife againſt each other, the injured party is an admiſſible witneſs againſt the other.

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Jagger's caſe, Mich. 1796, MS. Buller J. *vide* tit. Witneſs.

2. *Of fraudulently alluring away female Children under the Age of ſixteen from their Parents, &c.*

§ 6. *Alluring away women.* 4 & 5 Ph. & M. c. 8.

The ſtat. 4 & 5 Ph. & M. c. 8. intitled, "An act for the "puniſhment of ſuch as ſhall take away maidens that be "inheritors, being within the age of ſixteen years, or that "marry them without the conſent of their parents;" reciting, that "maidens and women children, as well ſuch as "be heirs apparent to their anceſtors, as others, having left "unto them by their father or other anceſtor and friends "lands, &c. or other great ſubſtances in goods and chattels, "for their advancement in marriage, be oftentimes unawares "to their friends and kinsfolks by flattery, trifling gifts, and "fair promiſes of unthrifty and light perſons, and thereto "by the intreaty of perſons of lewd demeanor, and others "that for rewards buy and ſell the ſaid maidens and children, ſecretly allured and won to contract matrimony "with the ſaid unthrifty and light perſons, and thereupon "either with ſleight or force oftentimes be taken and conveyed away from their ſaid parents, friends, or kinsfolks, "which for lack of wholeſome laws to the redreſs thereof "remains a great and common miſchief," enacts (ſ. 2.) "that it ſhall not be lawful to any perſon or perſons to take "or convey away, or cauſe to be taken or conveyed away "*any maid or woman child unmarried, being under the age of* "16 *years*, out of or from the poſſeſſion cuſtody or governance, and againſt the will, of the father of ſuch maid or "woman child, or of ſuch perſon or perſons to whom the "father by his laſt will and teſtament or by any other act in "his lifetime hath or ſhall appoint, &c. the order keeping "education or governance of ſuch maid or woman child; "except ſuch taking and conveying away as ſhall be done "by or for ſuch perſon or perſons as without fraud or covin "be or then ſhall be the maſter or miſtreſs, or the guardian "in ſocage, &c. of ſuch maid or woman child."

By ſ. 3. "If any perſon or perſons above the age of 14 "years ſhall unlawfully take or convey, or cauſe to be taken

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" or conveyed any maid or woman child unmarried, being " within the age of 16 years, out of or from the poſſeſſion " and againſt the will of the father or mother (*a*) of ſuch " child, or out of or from the poſſeſſion and againſt the will " of ſuch perſon or perſons as then ſhall happen to have, by " any lawful ways or means, the order keeping education " or governance of any ſuch maiden or woman child; every " ſuch perſon and perſons ſo offending, being thereof law- " fully attainted or convicted, (other than ſuch of whom " ſuch perſon taken away ſhall hold any lands or tenements " by knight ſervice,) ſhall ſuffer impriſonment for two years, " or elſe ſhall pay ſuch fine as ſhall be aſſeſſed by the court " of Starchamber."

(*a*) I. e. mother after the death of the father, according to the ſubſequent clauſe. 3 Co. 39. Ratcliffe's caſe. Poſt. 458.

By ſ. 4. " If any perſon or perſons ſhall ſo take or cauſe " to be taken away as is aforeſaid, and deflower any ſuch " maid or woman child as aforeſaid; or ſhall againſt the " will or unknowing of or to the father, if alive, or againſt " the will or unknowing of the mother of any ſuch maid or " woman child (having the cuſtody or governance of ſuch " child if the father be dead) by ſecret letters, meſſages, or " otherwiſe, contract matrimony with any ſuch maiden or " woman child; (except ſuch contracts of matrimony as " ſhall be made by the conſent of ſuch perſon or perſons as " by the title of wardſhip (*a*) ſhall then have or be entitled " to have the marriage of ſuch maid or woman child;) every " ſuch perſon or perſons ſo offending, being thereof lawfully " convicted as aforeſaid, ſhall ſuffer impriſonment for five " years, or elſe ſhall pay ſuch fine as ſhall be aſſeſſed by the " Starchamber, a moiety to the crown, and the other moiety " to the parties grieved."

By ſ. 5. juſtices of aſſize, by inquiſition or indictment, may hear and determine the ſaid offences. By ſ. 6. if any woman above 12 and under 16 years of age conſent to ſuch contract of marriage, contrary to the form of the ſtatute, the next of kin ſhall inherit her lands, &c. during her life.

Vide 4 Blac. Com 209, 210. Poſt. ch. 13.

It is firſt to be obſerved, that the ſtat. 26 Geo. 2. c. 33. abſolutely avoids all ſuch marriages as are alluded to in the above-recited act; and therefore ſome part of the temptation

(*a*) By ſtat. 12 Car. 2. c. 24. ſ. 1. ſuch wardſhips are aboliſhed. And by ſ. 8. the fathers of minors, or thoſe whom they ſhall appoint by deed or will, ſhall have the cuſtody and guardianſhip of ſuch minors, and may maintain actions of raviſhment of ward or treſpaſs againſt thoſe who wrongfully take or detain them.

to

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to ſuch offences is taken away: but this I apprehend has made no difference in the offences themſelves, which are oftentimes attended with circumſtances and conſequences peculiarly aggravating.

§ 7. *Conſtruction.*

It has been determined, that a baſtard under the care of her putative father is within the act of Philip and Mary; and it has been ſaid, that there muſt be a continued refuſal of the father, &c.; for if he once agreed, though he afterwards diſſented, yet it is an aſſent within this ſtatute (*a*). But this does not appear to have been the point in judgment, and ſeems to want further confirmation. However in Hicks v. Gore, where the mother who was guardian had placed her daughter under 16 years of age with Lady Gore for ſafe cuſtody, who cauſed her own ſon to marry the girl without having obtained her mother's conſent; Lord C. J. Herbert obſerved, that the ſtatute was made to prevent children from being ſeduced from their parents or guardians by flattering or enticing words, promiſes, or gifts, and married in a ſecret way to their diſparagement; but that no ſuch thing appeared in that caſe, the marriage being openly ſolemnized in church in a canonical hour, in the preſence of many perſons: and the plaintiff was nonſuited. In that caſe it is to be noted, that the mother had placed the child under the care of Lady Gore, by whoſe procurance the marriage was effected; but nothing is ſtated in the report to ſhew that the Chief Juſtice laid any ſtreſs on this circumſtance. And in truth it deſerves good conſideration before it is decided that an offender acting in colluſion with one who has the temporary cuſtody of another's child, for a ſpecial purpoſe, and knowing that the parent or proper guardian did not conſent, is yet not within the ſtatute. For then every ſchool-miſtreſs might diſpoſe in the ſame manner of the children committed to her care: though ſuch delegation of the cuſtody of a child for a particular purpoſe be no delegation of the power of diſpoſing of her in marriage; but the governance of the child in that reſpect may ſtill be ſaid to remain in the parent. And if the principal offender in ſuch caſe were within the act, it muſt follow that all who combine with him for the ſame purpoſe are equally guilty. In Ratcliffe's caſe it was holden, that the mother, notwithſtanding a ſubſequent marriage, retained

R. v. Cornforth, 2 Stra. 1162. & MS. R. v Sweeting, 1766. S. P. MS.

(*a*) Calthrop v. Axtel, 3 Mod. 169. Hicks v. Gore, 3 Mod. 84.

Ratcliffe's caſe, 3 Co. 39. b.

the

Ch. XI. § 7. *Taking or fraudulently alluring away female infants.*

the guardianſhip of her daughter by her former huſband; and that the aſſent of her ſecond huſband to the taking and marrying of the ward by another was not material; and that the mother had in law the cuſtody of her child within the ſtatute at the time of the contract of marriage, although the latter had departed from the houſe ſix hours before. And there too it was found that ſuch departure of the daughter was voluntary and of her own accord. It was alſo ruled there, that the third branch (4th clauſe) of the act extends only to the cuſtody of the father or to that of the mother, where the father has not diſpoſed of the cuſtody of the child to others.

§ 8. *Juriſdiction.* Moor's caſe, 2 Mod. 128. *Vide* Cro. Car. 465. 4 Mod. 145.

It is certain that an information will lie in B. R. upon this ſtatute; and that the court may fine as well as impriſon; although the ſtatute expreſsly gives this juriſdiction to the Starchamber; there being no negative words to ouſt the juriſdiction of the ſuperior criminal court; and as it is ſaid in Moor's caſe, this being an offence at common law, and as ſuch puniſhable by fine and impriſonment. How far this latter obſervation is well founded I proceed now to inquire.

3. *Of forcible or fraudulent procurement of marriage.*

§ 9. *At common law.* 3 MS. Sum 53. *Vide* R. v. Marriot, 4 Mod. 145.

Beſides the offences which fall under the abovementioned acts the common law has in ſome reſpects at leaſt guarded againſt malpractices of the like nature. It has been ſaid indeed upon good conſideration, that if a man marry a woman under age without the conſent of her father or guardian, that alone will not render it indictable at common law; for that marriage being lawful in itſelf, though reſtraints may be laid on it by poſitive laws, yet where no ſuch law is enacted or tranſgreſſed, the bare act of ſuch a marriage cannot be puniſhed as a crime, however grievous it may be to a parent: and I cannot find any caſe where an indictment has been maintained for ſuch an act without other circumſtances. There are, it is true, dicta to be found in the books, which may ſeem to countenance ſuch an opinion; but the caſes, when examined, do not warrant it to ſo general an extent. In Twiſſleton's caſe, upon which moſt ſtreſs has been laid, the information, which was againſt ſeveral, charged not only a conſpiracy, but a deceitful and riotous taking away; though the latter did not appear to have been proved:

Moor's caſe, 2 Mod. 130. R. v. Blacket and others, 7 Mod. 39. R. v. Twiſſleton and others, 1 Lev. 257. 1 Sid. 387. 2 Keb. 432, 8. R. v Thorp and others, Carth. 384. 5 Mod. 221. Com. 27. 12 Mod. 516.

and

Ch. XI. § 9. *By unlawful means at common law.*

and after objection taken, and before final judgment, the defendants were bailed by conſent. But however this may be, if children be taken from their parents or guardians, or others entruſted with the care of them, by any ſiniſter means; either by violence, deceit, conſpiracy, or any corrupt or improper practices, as by intoxication, for the purpoſe of marrying them; though the parties themſelves may be conſenting to the marriage; ſuch criminal means will render the act an offence at common law: for marriage ought to be free and voluntary, without any compulſive or ſiniſter procurement. It is alſo agreed (*a*) that an indictment lies by the rule of the common law upon the general prohibitory clauſe (ſ. 2.) of the abovementioned ſtatute of Ph. & Mary, which makes it unlawful to take or convey away any woman child unmarried, being under the age of 16 years, out of the poſſeſſion, cuſtody, or governance, and againſt the will of her father or deputed guardian. For where a thing is prohibited to be done by ſtatute, and a penalty annexed to it by a ſeparate ſubſtantive clauſe; the proſecutor is not bound to purſue the latter, but may indict on the prior general clauſe as for a miſdemeanor. And the prohibition being general, the want of a corrupt motive is no anſwer to the criminal charge.

R. v. Pierſon and others, Andr. 310. R. v. Story, 3 Keb. 101. R. v. Ld. Oſſulſton and others, 2 Stra 1107. R. v. Ward, Blac. R. 386. R. v. Furas, B. R. temp. W. & M. MS. Tracy.

(*a*) Moor's caſe, 2 Moc. 130.

R. v. Harris, 4 Term R. 202.

R. v. Sainſbury, 4 Term R. 457.

§ 10.

By the ancient law the marriage of a ward without the conſent of the guardian was a raviſhment of the ward. And by the ſtat. of Weſtm. 2. (13 Ed. 1. c. 35.), "concerning children male or female (whoſe marriage belongeth to another) taken and carried away; if the raviſher have no right in the marriage, though after he reſtore the child unmarried, or elſe pay for the marriage, he ſhall nevertheleſs be puniſhed for his offence by two years impriſonment; and if he do not reſtore or do marry the child after the years of conſent, and be not able to ſatisfy for the marriage, he ſhall abjure the realm, or have perpetual impriſonment; and thereupon the plaintiff ſhall have ſuch a writ" as is therein ſet forth. But the ſtat. 12 Car. 2. c. 24. which aboliſhed wardſhips, ſeems to have ſuperſeded the above proviſion; and the 8th ſection, which enables fathers to diſpoſe of the guardianſhip of their children under age, though it give an action of raviſhment of ward or treſpaſs againſt ſuch as wrongfully take away or detain

2 Inſt. 440. 2 P. Wms. 120.

Ch. XI. § 10. *By unlawful means at common law.*

detain ſuch children, for the recovery of them, and for damages for their uſe and benefit; yet is ſilent as to any corporal puniſhment of the raviſhers.

R. v. Ld. Grey and others, trial at bar, Mich. 34 Car. 2. 3 St. Tr. 519. *Conſpiracy to entice a young woman under age to leave her father's houſe and live in fornication with one of the defendants, and concerting meaſures with her own approbation to carry her off and conceal her for that purpoſe.*

In the caſe of the Lord Grey and others, the information, which was at common law, charged that they unlawfully and wickedly, &c. by unlawful and impure ways and means, conſpiring, practiſing, and intending the ruin and deſtruction of the lady Henrietta Berkeley, then a virgin unmarried within the age of 18 years, one of the daughters of George Earl of Berkeley, (the ſaid lady H. B. then and there being under the cuſtody, government, and education of the ſaid Earl,) unlawfully, to perfect and bring to effect their wicked intentions aforeſaid, the ſaid lady H. B. to deſert the ſaid Earl her father, and to commit whoredom, fornication, and adultery, and in whoredom, &c. to live with the ſaid Lord Grey, then and before being the huſband of Lady Mary, another daughter of the ſaid Earl and ſiſter of the ſaid Lady H., againſt all laws divine and human, impiouſly, wickedly, impurely, and ſcandalouſly to live and cohabit, did tempt, invite, and ſolicit: and that the defendants, with force and arms, &c. unlawfully, unjuſtly, and without the leave and againſt the will of the ſaid Earl B. in proſecution of ſuch conſpiracy the ſaid Lady H. B. then and there, about 12 at night, &c. out of the dwelling-houſe of the ſaid Earl, and out of his cuſtody and government did take, carry, and lead away: And the ſaid Lady H. B. from, &c. until, &c. in divers ſecret places with the ſaid Lord Grey unlawfully, &c. to live, cohabit, and remain, did procure and cauſe; to the ruin of the ſaid Lady H. B. and to the evil example, &c. There was no proof of any force at the trial; for the lady was deſirous to leave her father's houſe; and all the meaſures that were taken for her departure, and afterwards for her concealment, were plainly concerted with herſelf. The other perſons concerned beſides Lord Grey were his own ſervants, or perſons acting by his command and under his control. Neither was there proof of any artifice uſed to prevail on her to depart from her father's houſe; but only, as Lord C. J. Pemberton expreſſed himſelf to the jury, a ſolicitation and enticement of her to unlawful luſt by Lord Grey. Indeed ſhe herſelf, who was examined as a witneſs for the defendants, diſclaimed all other motives than her own

own free will in the tranſaction. None of the judges expreſſed any doubt of the law; and the jury, with the approbation of the court, found all the defendants guilty but one, againſt whom there was no evidence. But no judgment was ever given, as the matter was afterwards compromiſed.

Ch. XI. § 10. *By unlawful means at common law.*

§ 11. *Conſpiracy to marry paupers.*

Of a ſimilar nature is the offence of conſpiring or contriving by ſiniſter means to marry a pauper of one pariſh to a ſettled inhabitant of another, in order to bring a charge upon it. Informations for conſpiracies of this kind were granted in the caſes of the King v. Tarrant, and the King v. Herbert and others. Though where the parties are in low circumſtances an indictment is preferable. Conſidering the offence as a proſtitution of the ſacred rites of marriage for corrupt and mercenary purpoſes, and that by artful and ſiniſter means perſons are ſeduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming ſo cloſe an union, and on which the happineſs of them both ſo entirely depends; and this for the ſake of ſome gain or ſaving to others who bring about ſuch a marriage; in this light it ſeems a fit ground for criminal cognizance; not only as being a great oppreſſion upon the parties themſelves more immediately intereſted, but as an offence againſt ſociety in general; being an abuſe of that inſtitution by which ſociety is beſt continued, and legal deſcents preſerved, and a perverſion of the purpoſes for which it was ordained. Yet where it appeared upon an indictment for this offence againſt pariſh officers that a man of one pariſh had gotten a woman with child belonging to another, and the defendants had agreed with the man, (who was of the age of 29,) with the approbation of his father, to give him two guineas if he would marry the woman, which he afterwards did on that condition, and received the money from the defendants immediately after the marriage: and both he and the woman ſwore at the trial that they were willing to marry at the time; Buller J. directed an acquittal, notwithſtanding the proof of the money having been given to procure ſuch conſent; and this after the putative father had been taken up under a magiſtrate's warrant, and was in cuſtody of the overſeers. For he held it neceſſary in ſupport of ſuch an indictment to ſhew that

3 MS. Sum. 56. R. v. Tarrant, 4 Burr. 2106. R. v. Herbert and others, Mic. 32 G. 2. MS. Dunning. R. v. Compton and others, Cald. 246.

R. v. Fowler and others, Taunton, Sp. Aſſ. 1788, cor. Buller J. MS.

Ch. XI. § 11. *Conſpiracy to marry paupers.*

that the defendants had made uſe of ſome violence, threat, or contrivance, or uſed ſome ſiniſter means to procure the marriage, without the voluntary conſent or inclination of the parties themſelves. But here there was an expreſs conſent ſhewn by both parties to be married. That the act of marriage being in itſelf lawful, a conſpiracy to procure it could only amount to a crime by the practice of ſome undue means: and this he ſaid had been ſeveral times ruled by different judges. The circumſtance of the woman being with child by the perſon to whom ſhe was afterwards married has always weighed with the court in refuſing to interfere by way of information in theſe caſes. But where the indictment ſtated the marriage to have been procured by threats and menaces againſt the peace, &c., it was holden ſufficient, without averring it in terms to have been againſt the will or conſent of the parties; though that muſt be proved.

Cald. 247.

Indictment. Rex v. Parkhouſe and Tremlet, Exeter, Sum. Aſſ. 1792, cor. Buller J. MS.

Upon an indictment for conſpiring together and giving the huſband money to marry a poor helpleſs woman who was an *inhabitant* of B. in order to ſettle her in the pariſh of A., where the huſband was ſettled, judgment was arreſted, becauſe it was not averred that ſhe was laſt legally ſettled in B.: and yet it ſeems to be perfectly immaterial where the woman's ſettlement was if it were not in A.; provided that fact diſtinctly appeared. However it is uſual to aver the ſettlements of the parties in their reſpective pariſhes; and alſo that the woman was chargeable to her own pariſh at the time: though this latter has never been adjudged to be neceſſary; nor does it ſeem to be required according to the general rules which govern the offence of conſpiracy, for which an indictment lies wherever either the conſpiracy is entered into for a corrupt or illegal purpoſe, or for the uſe of unlawful means to effect a legal purpoſe, although ſuch purpoſe be not effected. And it cannot be denied that not only the purpoſe is unlawful whether the woman were chargeable or not at the time, (being to diſcharge one pariſh of a liability to bear a burthen, and impoſe ſuch liability on another,) but the means propoſed, if of the kind before deſcribed, are alſo unlawful. Offenders of this deſcription are puniſhable as in other caſes of miſdemeanor.

R. v. Edwards and others, 8 Mod. 320.

Vide Crown Circ. Aſſiſt. 182.

CHAP. XII.

OF POLYGAMY OR BIGAMY.

Nature of Offence, and how puniſhable. - § 1.
Originally of eccleſiaſtical Cognizance. *ib.*
Clergy taken away by Stat. 4 Ed. 1. c. 5. but reſtored by Stat. 1 Ed. 6. c. 12. ſ. 16. *ib.* Made Felony by Stat. 1 Jac. 1. c. 11. if any marry, the former Conſort living. *ib.*
By Stat. 18 Eliz. c. 7. Offender may be burned in the Hand and impriſoned; or in lieu of burning may be fined or whipped, by Stat. 19 Geo. 3. c. 74. *ib.*; or in lieu of burning and whipping may be tranſported for 7 Years by Stat. 35 Geo. 3. c. 67. *ib.* Clergy ouſted on returning before the Period from Tranſportation. *ib.*

What Marriages within the Stat. 1 *Jac. c.* 11. § 2.
Qu. if the ſecond Marriage be abroad. *ib.*

Exceptions. - - - - § 3.
1. Abſence beyond Sea for 7 Years, whether with or without Notice. *ib.*
2. Abſence within the Kingdom for 7 Years, without Knowledge. - - - § 4.
3 & 4. Sentences of Divorce, of what Sort. § 5.
5. Being within Age. - - § 6.

Trial. - - - - - § 7.
May be in County where apprehended, (i. e. where impriſoned,) by ſtat. 1 Jac. 1. c. 11. But this only accumulative: It may alſo be in County where ſecond Marriage had. *ib.* Offenders, returning from Tranſportation before their Term expired, triable where taken or where convicted. *ib.*

Indictment, Form of. - - - § 8.

Witneſs. - - - - § 9.
The ſecond Conſort, after Proof of firſt Marriage. *ib.*

Evidence of Marriage. - - - § 10.
Qu. by a Roman Catholic Prieſt here. *ib.*
Qu. whether Cohabitation and Acknowledgment as Man and Wife ſufficient per ſe. *ib.* Certainly ſo when

when backed by confirmatory Evidence of authentic Documents. *ib.*

Regiſter of Marriage required by the Marriage Act 26 G. 2. c. 33. ſ. 14. - - § 11.

Not neceſſary to be proved by ſubſcribing Witneſs; but Copy of the Regiſter ſufficient, or Proof by one preſent at the Ceremony. *ib.*

Polygamy, or Bigamy.

§ 1. *Nature of offence.* 3 Inſt. 88. 4 Blac. Com. 163. Cro. Eliz. 94. 2 Inſt. 273.

POLYGAMY, or as it is more frequently, though improperly, called Bigamy, (which only means having two wives in ſucceſſion,) conſiſts in having a plurality of wives at the ſame time, and was originally conſidered as of eccleſiaſtical cognizance only: though ſo early as the ſtat. 4 Ed. 1. c. 5. de Bigamis, it was treated as a capital offence, and ouſted of clergy by that ſtatute. The benefit of clergy was however reſtored by the ſtat. 1 Ed. 6. c. 12. ſ. 16. And the crime itſelf being as it ſeems left of doubtful temporal cognizance, the ſtat. 1 Jac. 1. c. 11. enacts, "that if any "perſon or perſons within England and Wales, being mar- "ried, or who hereafter ſhall marry, do marry any perſon or "perſons, the former huſband or wife being alive; every "ſuch offence ſhall be felony; and the perſon and perſons "ſo offending ſhall ſuffer death as in caſes of felony." Clergy however is not thereby taken away; but by the ſtat. 18 Eliz. c. 7. ſ. 2, 3. the offender beſides being burned in the hand may be impriſoned not exceeding one year: and by ſtat. 19 Geo. 3. c. 74. ſ. 3. a moderate fine or whipping, in the manner therein ſpecified, may be ſubſtituted in lieu of burning; but not to abridge the power of the court to impriſon under any former act. And now by the ſtat. 35 Geo. 3. c. 67. "If any perſon or perſons within Eng- "land and Wales being married do at any time from and "after the paſſing of this act marry any perſon or perſons, "the former huſband or wife being alive, and ſhall be in "due manner convicted under the ſaid act (of Jac. 1.) they "ſhall be ſubject to the ſame puniſhments, pains, and penal- "ties as by the laws now in force perſons are ſubject to "who are convicted of grand or petit larceny." This by the ſtat. 4 Geo. 1. c. 11. may be tranſportation for ſeven years in lieu of burning or whipping. But though the ſtat. 35 Geo. 3. merely re-enacts the enacting part of the ſtat. of

2 (vulgo 1) Jac. 1. c. 11. *Felony.*

Clergy, puniſhment, burning, impriſonment.

Fine or whipping.

Tranſportation for 7 years. 35 G. 3. c. 67.

4 G. 1. c. 11. & 6 G. 1. c. 23.

James, yet it alſo virtually includes all the exceptions contained therein, and after mentioned; for the title of the act is, "for rendering more effectual the ſtat. 1 Jac. 1.;" and it begins by reciting that "whereas the *puniſhment* of perſons "convicted of felony under the ſtat. 1 Jac. 1. has not "proved effectual to deter wicked perſons from the *offence* "*therein deſcribed*, be it enacted," &c.; and it afterwards attaches the increaſed puniſhment upon ſuch as are convicted of the offence ſpecified *under the ſaid act*.

Ch. XII. § 1. *Nature of offence.*

By ſ. 2. "If any perſon ordered to be tranſported by this "act ſhall be afterwards at large within Great Britain with-"out ſome lawful cauſe before the expiration of the term, "&c., every ſuch perſon being thereof lawfully convicted "ſhall be guilty of felony, and ſuffer death without benefit "of clergy."

Returning from tranſportation.

By ſ. 4. of 1 Jac. 1. c. 11. no attainder for any felony by that act ſhall work corruption of blood, loſs of dower, or diſheriſon of heirs.

§ 2.

In regard to the enacting part of the ſtat. of James above ſet forth, it ſeems that where the firſt marriage was abroad and the ſecond in England or Wales, the offender is indictable; but if the firſt marriage were in England and the ſecond abroad, though in Ireland, the general opinion ſeems to be that it is not within the act: for the ſecond marriage, which alone conſtitutes the offence, is a fact done within another juriſdiction; and though inquirable here for ſome purpoſes like all tranſitory acts, is not cognizable as a crime by the rule of the common law. Both Kelyng and Hawkins however ſubjoin a quære to this opinion; the latter founding it upon another part of the ſtatute which directs the trial, &c. of ſuch offenders to be in the county where they ſhall be apprehended, *as if the offence had been committed in ſuch county*. Yet I cannot think that this proviſion which is to be found in other ſtatutes is ſufficient to take this caſe out of the general rule. The queſtion muſt ſtill be whether, without a poſitive enactment for that purpoſe, any act be cognizable as an offence againſt the law of England which was committed out of the juriſdiction of that law. Beſides that the very words of the enacting clauſe in grammatical conſtruction confine the operation of it to perſons who, being married, ſhall *within England and Wales* marry any other.

What marriage is an offence within the ſtat. 1 Jac. 1. c. 11.
1 Hale, 692.
1 Hawk. ch. 44. ſ. 7. Kel. 79, 80. 1 Sid. 171.

Vide Black Act, and 10 & 11 W. 3. c. 25. for trial in any county here of murder, &c. committed in Newfoundland.

Ch. XII. § 2. *What marriage is an offence within the ſtatute* 1 *Jac* 1 *c.* 11.

A. married B. in Holland, and afterwards in the ſame country married C. in B.'s lifetime; B. died, and then, living C., A. married D. in England. This was holden not to be within the act; becauſe the marriage with C. was ſimply void. But if B. had been living it would have been felony to have married D. in England.

Lady Madiſon's caſe, O. B. 1648. 1 Hale, 693. 3 Inſt. 88.

But though the firſt marriage be voidable, as by reaſon of conſanguinity or the like; yet being a marriage in judgment of law, and ſubſiſting in fact at the time, till it be avoided a ſecond marriage would be within the act: ſuch ſecond marriage however is merely void.

§ 3. *Exceptions in ſtat.* 1 *Jac.* 1. *c.* 11.

The ſtatute itſelf of Jac. 1. contains a proviſo with the five following exceptions:

7 years abſence beyond ſea. Vide poſt, 467.

1. "That it ſhall not extend to any perſon or perſons "whoſe huſband or wife ſhall be continually remaining "beyond the ſeas by the ſpace of ſeven years to-"gether."

1 Hale, 693. 3 Inſt. 88. 4 Blac Com. 164. 2 MS. Sum. 330.

Upon this branch the conſtruction has been, that where either of the parties is beyond the ſeas for ſeven years, though the party in England have notice that the other is living, it is no felony to marry again; although the ſecond marriage be void.

The terms of this proviſo, eſpecially as they are contraſted with the wording of the next, which adverts to ſuch a notice, do certainly warrant the conſtruction which has been put upon them; otherwiſe it might have been worthy of conſideration, that unleſs the legiſlature had gone the length of avoiding the firſt marriage by an abſence of either of the parties beyond ſea for ſeven years, it would have been a more reaſonable proviſion to have made ſuch an abſence in itſelf only primâ facie evidence of the death of the party. For it ſeems a moſt extraordinary enactment which enables a perſon with impunity wilfully to draw an innocent perſon into a connexion attended with all the miſchiefs which the body of the act was intended to prevent.

§ 4. *2d Exception, abſence within the kingdom for 7 years without knowledge.* 3 Inſt. 88. 2 MS. Sum 330.

The ſecond exception of the ſtat. 1 Jac. 1. exempts any perſon "whoſe huſband or wife ſhall abſent him or herſelf "the one from the other by the ſpace of ſeven years toge-"ther in any parts within his majeſty's dominions, the one "of

Ch. XII. § 4. *Exceptions, &c. Abſence within the king's dominions.*

" of them not knowing the other to be living within that " time." Here the want of ſuch knowledge is important to excuſe the ſecond marriage. Whether the party be not bound to uſe reaſonable diligence to inform himſelf of the fact; and ſtill more, whether if he neglect or refuſe to avail himſelf of palpable means of acquiring ſuch information, he will ſtand excuſed? are queſtions which I do not find any where touched upon; but which ſeem worthy of mature conſideration.

Then it is important to inquire how far the expreſſion " within the king's dominions" extends: and whether it were intended to be taken as a boundary altogether diſtinct from the line drawn in the firſt exception of " beyond the " ſeas." Lord Hale puts the caſe of Ireland, which he obſerves is within the firſt exception, as being *beyond the ſeas*; and yet being *within the king's dominions* is not aided by the words of the ſecond, unleſs without notice. And therefore, he adds, that in order to make both clauſes conſiſtent, the words *within the king's dominions* muſt in favorem vitæ be intended within *England, Wales, and Scotland.*

1 Hale, 693.

§ 5. *3d and 4th Exceptions, ſentences of divorce.* 1 Jac. 1. c. 11. ſ. 3.

The third and fourth exceptions provide (ſ. 3.) " That " nothing in the act ſhall extend to any perſon or perſons " that are or ſhall be at the time of ſuch marriage divorced " by any ſentence had in the eccleſiaſtical court; or to any " perſon or perſons where the former marriage hath been by " ſentence in the eccleſiaſtical court declared to be void and " of no effect." The firſt of theſe exceptions has been holden to extend even to a divorce a menſâ et thoro. Though certainly ſuch a conſtruction muſt be admitted to be entirely beſide the reaſon and juſtice of the exception; letting in the very miſchief intended to be provided againſt by the ſtatute. In Porter's caſe this point was much doubted; and the wife who was divorced by ſuch a ſentence propter ſævitiam was adviſed to obtain a pardon: yet other authorities are poſitive to its falling within the exception. And at the O. B. 14 Car. 2. Thomas Middleton being indicted on this ſtatute, and producing a divorce from his firſt wife under ſeal cauſa adulterii, (which is only a divorce a menſâ et thoro,) it was agreed that he was not within the ſtatute. It is alſo agreed that a ſecond marriage, pending an appeal from a divorce a vinculo matrimonii, is aided by this exception; though the appeal ſuſpends and poſſibly may repeal

1 Hale, 699. 2 MS. Sum 330.

Porter's caſe, Cro. Car. 461.

3 Inſt 89. 1 Hawk. ch 43. ſ. 5. Sum. 122. 4 Blac. Com 164. Middleton's caſe, O B. 14 Car. 2. Kel. 27.

1 Hale, 694. 3 Inſt. 89.

Ch. XII. § 5. *Exceptions, &c. divorce by ſentence.*

the ſentence; in which caſe the ſecond marriage would of courſe be invalid.

Duchess of Kingſton's caſe, Dom. Proc. 16 G. 3. 21 St. Tr. 262.

In the caſe of the Ducheſs of Kingſton, who was tried for polygamy, a ſentence in the eccleſiaſtical court againſt the validity of a former marriage in a ſuit of jactitation of marriage was produced in evidence on her behalf, and contended to be concluſive, being unappealed from. But firſt it was holden not to be concluſive in itſelf; the ſentence having decided on the invalidity of the marriage only collaterally, and not directly. But further, admitting it in general to be concluſive, yet the effect of it might be avoided by ſhewing that it had been obtained by fraud or colluſion: and ſhe was declared guilty.

§ 6. *5th Exception, within age.* 1 Jac. 1. c. 11. ſ. 3. 3 Inſt. 89. 1 Hale, 17. 694. 2 MS. Sum. 330. 1 Hawk. ch. 43. ſ. 6.

Laſtly, it is provided that the act ſhall not extend "to "any perſon or perſons for or by reaſon of any former mar-"riage had or made within age of conſent."

If either party be within the age of conſent, which in the man is 14, and in the woman 12, the 5th exception extends to both; for the power of diſſent to the former marriage muſt be reciprocal. And yet in a civil light a promiſe of marriage by an adult to one under age will ſubject the adult to an action for a breach of ſuch promiſe. But if both are above thoſe reſpective ages at the time of the firſt marriage, though under 21, a ſecond marriage would be felony. And though either were under the age of conſent when the firſt marriage was contracted, if they agreed to it when both had attained ſuch age, by which the marriage is completed; it ſeems that a ſecond marriage would be within the reaſon and penalties of the act.

Bolt v Ward, Tr. 5 G. 2.

1 Hale, 694. 4 Blac. Com. 165.

Trial.

§ 7. *Trial.* 1 Jac. 1. c. 11. ſ. 1.

Offenders within the ſtatute of James are directed to "receive ſuch and the like proceeding, trial, and execution, "in ſuch county where they ſhall be apprehended, as if the "offence had been committed in the ſame county where "ſuch perſon or perſons ſhall be taken or apprehended." This, according to the reſolution in Lord Digby's caſe, may be in the place where the party is impriſoned. And it is only an accumulative proviſion; for the offender may ſtill be indicted where the ſecond marriage was, though he be never apprehended; and ſo may be outlawed.

Ld. Digby's caſe, Hutt. 131.

2 Hale, 694.

35 G. 3. c. 67.

By ſ. 3. of the ſtat. 35 Geo. 3. "ſuch perſon and perſons "ſo ordered to be tranſported as aforeſaid, and afterwards

" found at large within Great Britain may be tried for such " offence either in the county where such person or persons " was or were so convicted and ordered to be transported as " aforesaid, or in such county where they shall be apprehend- " ed and taken, (such county being within England or " Wales); and in such latter case the clerk, or other person " having the custody of the records of the court by which " such person or persons was or were ordered to be tran- " sported, shall certify a transcript briefly containing the " tenor and effect of the record of the indictment, verdict, " and judgment against them; which certificate, being pro- " duced to the court before whom such person or persons " shall stand on their trial, shall be deemed sufficient evi- " dence of the indictment, verdict, and judgment con- " tained in such record."

Indictment.

§ 8. *Indictment.*

The indictment must state the two marriages, and aver that the former consort was alive at the time of the second marriage. In the Duchess of Kingston's case the first count stated generally that the defendant on such a day, &c. being then married and then the wife of A. J. H., with force and arms at, &c. did feloniously marry E. P. &c. the said A. J. H. being then alive, &c. The second count stated the time and place of the first as well as the second marriage. When the trial is in the county where the party was apprehended, there is an additional averment of that fact.

Duchess of Kingston's case, 11 St. Tr. 200. Crown Cir. Ass. 19. Porter's case, Cro. Car. 461. Crown Cir. Comp. 271.

Witness.

§ 9.

The first and true wife cannot be a witness against her husband, nor vice versâ; but the second may certainly be admitted to prove the second marriage; for the first marriage being proved, she is not so much as wife de facto; but that must be first duly established.

1 Hale, 693. 2 MS Sum. 311. Ann Cheney's case, O. B. May 1730, Serjt. Porter's MS.

Evidence of Marriage.

§ 10. *Evidence.*

In respect of the manner of proving the two marriages, the first must be duly established according to the rites and custom of the country in which it was celebrated.

Where the first marriage, which was with a Roman catholic woman, was by a Romish priest in England, not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witnesses not under-

Lyon's case, O.B. Dec 1738, Serjt. Forster's MS.

Ch. XII. § 10. *Evidence of marriage.*

ſtanding could not ſwear even that the ceremony of marriage according to the church of Rome was read, the defendant was directed to be acquitted *. But Ld. Ch. J. Willes who tried him ſeemed to be of opinion that a marriage by a prieſt of the church of Rome was a good marriage (*a*), could the ceremony according to that church be proved, namely, the words of the contracting part of it.

* The ſecond marriage was by a clergyman of the church of England.

Mary Norwood's caſe, ante, 335.

In Mary Norwood's caſe confeſſion, cohabitation, and the like were admitted as evidence to prove the relation of huſband and wife in petit treaſon.

Morris v. Miller, 4 Burr. 2059.

But in Morris v. Miller, in an action for criminal converſation, it was ſaid that theſe were not ſufficient in that caſe, nor in proſecutions for bigamy, but that a marriage in fact muſt be proved. However, what was there ſaid obiter, ſo far at leaſt as it relates to this offence, ſeems to have been ſhaken in a ſubſequent caſe.

Truman's caſe, Nottingham Sp. Aſſ. 1795, MS. Jud

Proof of the priſoner's cohabiting with and acknowledging himſelf married to a former wife then living, backed by production of a copy of a proceeding in a Scotch court againſt them for having contracted ſuch marriage improperly; (the marriage, however, being ſtill good according to that law,) is ſufficient evidence of the firſt marriage on an indictment for polygamy.

Joſeph Truman was indicted, for that he having married Mary Ruſſell, ſpinſter, at Ruglen in Scotland, afterwards on, &c. at, &c. married Jane Caſs, the ſaid Mary Ruſſell his former wife being then living. A witneſs proved that he knew the priſoner; that Mary Ruſſell, who was ſtill alive, lived with him, and he acknowledged that he had been married to her in Scotland; and once ſhewed the witneſs a paper, which he ſaid was a certificate of the marriage. The priſoner not having produced this paper purſuant to notice, a copy of it was proved, and the priſoner's acknowledgment of his own hand-writing to the original. The writing in queſtion purported to be a proceeding before a court in Scotland, wherein "the proſecutor fiſcal of the court complained upon Joſeph Truman and Mary Ruſſell his wife, that by act of Car. 2. parl. 1. ſeſſ. 1. c. 34. it is enacted, that whoever marries in a clandeſtine unorderly manner, or by perſons not authorized by the kirk, ſhall be impriſoned for three months and pay 100 marks, &c.; and the perſons ſo married are obliged when required to declare the names of the celebrator and witneſs, &c.; yet nevertheleſs true it is, that J. T. and M. R. were married within three months laſt paſt by ſome perſon not authorized by the kirk, and without proclamation of banns; and therefore ſhould be fined in the terms of the act to deter others from committing the like."

(*a*) *Quære*; This muſt at leaſt be underſtood of the marriage of perſons of that communion.

"At

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"At Ruglen, 15th of January 1793, a perſonal warning was verified againſt the defendants, who appeared and acknowledged that they were married at the time mentioned in the complaint; but declare that they cannot declare the names of the celebrator and witneſs. Signed Joſ. Truman and Mary Ruſſell," and indorſed by two witneſſes. "Having conſidered the complaint with the above acknowledgment of the defendants, the complaint proven by ſaid acknowledgment; and in reſpect thereof fines them in 100 marks to be applied," &c. Upon this evidence, together with due proof of the ſecond marriage, the priſoner was convicted; and the queſtion was reſerved for the opinion of the Judges, whether the firſt marriage were legally proved? In Eaſter term 1795 all the Judges (abſent Perryn B. and Buller J.) held the conviction proper. It was obſerved by two of the Judges that this did not reſt upon cohabitation and bare acknowledgment; for the defendant had backed his aſſertion by the production of a copy of a proceeding againſt him for having improperly contracted his firſt marriage. But ſome thought that the acknowledgment alone would have been ſufficient, and that the paper produced in evidence was only a confirmation of ſuch acknowledgment: and one of them obſerved upon the caſe of Morris v. Miller, that there was a diſtinction between an action for criminal converſation and an indictment for this offence: that in the former the acknowledgment and cohabitation of the plaintiff could not prove his marriage as againſt the defendant; and the acknowledgment of the defendant in ſuch an action of the plaintiff's marriage might be of a fact not within his own knowledge; as it muſt be if a defendant in bigamy admitted his own marriage.

Ante, 470.

With reſpect to ſuch evidence of a bare acknowledgment in this caſe, it may be difficult to ſay that it is not evidence to go to the jury, like the acknowledgment of any other matter in pais where it is made by a party to his own prejudice at the time. But it muſt be admitted that it may under circumſtances be entitled to little or no weight; for ſuch acknowledgments made without conſideration of the conſequences and palpably for other purpoſes at the time, are ſcarcely deſerving of that name in the ſenſe in which acknowledgments are received as evidence; more eſpecially if made before the ſecond marriage, or upon occaſions, when

Ch. XII. § 10. *Evidence of marriage.*

in truth they cannot be ſaid to be to the party's own prejudice, nor ſo conceived by him at the time.

§ 11. *Regiſter of marriage.*

The marriage act 26 Geo. 2. c. 33. ſ. 14. for preventing undue entries and abuſes in regiſters of marriages, directs the churchwardens, &c. to provide proper books in which all marriages and banns of marriage there publiſhed or ſolemnized ſhall be regiſtered in the manner therein ſtated; and that the ſame ſhall be ſigned by the parſon, vicar, miniſter, or curate, or by ſome other perſon in his preſence and by his direction: and that all ſuch books ſhall belong to every ſuch pariſh, &c. and be kept for public uſe. Then by ſ. 15. "In order to preſerve the evidence of marriages, and "to make the proof thereof more certain and eaſy, and for "the direction of miniſters in the celebration of marriages "and regiſtering thereof, it is enacted, that all marriages "ſhall be ſolemnized in the preſence of two or more credi-"ble witneſſes beſides the miniſter who ſhall celebrate the "ſame; and that immediately after the celebration of every "marriage an entry thereof ſhall be made in ſuch regiſter "to be kept as aforeſaid; in which entry or regiſter it ſhall "be expreſſed that the ſaid marriage was celebrated by "banns or licence; and if both or either of the parties "married by licence be under age, with conſent of the pa-"rents or guardians, as the caſe ſhall be; and ſhall be ſigned "by the miniſter with his proper addition, and alſo by the "parties married, and atteſted by ſuch two witneſſes;" according to the form or effect therein ſet forth.

Birt v. Barlow, B. R. M. 1779, Bull. N. P. 27. (*a*) Per Lord Mansfield C. J. in Morris v. Miller, 4 Burr. 2059.

In an action for criminal converſation (wherein the proof is in this reſpect at leaſt as ſtrict as in caſes of bigamy (*a*),) it was ruled not to be neceſſary to call one of the ſubſcribing witneſſes to the regiſter to prove the identity of the perſons married; for that a copy of the regiſter was ſufficient evidence of the marriage in fact between perſons of the deſcription there mentioned; and any evidence which ſatisfied a jury as to the identity of the parties was ſufficient; as if their hand-writing to the regiſter be proved; or that bell-ringers were paid by them for ringing for the wedding, or the like: and ſuch marriage in fact may, it is ſaid, be proved as well by the teſtimony of one who was preſent at the ceremony as by the copy of the regiſter.

Bull. N. P. 27.

CHAP. XIII.

OF OFFENCES TOUCHING CLANDESTINE AND ILLEGAL MARRIAGES.

1. *By the Marriage Act*, 26 Geo. 2. c. 33. §2.

Banns to be publiſhed in ſome Pariſh Church or public Chapel where uſually before done. *ib.*

Previous Notice to be given to the Miniſter of the Names and Places of Abode of the Parties. *ib.*

Notice to be given of Diſſent of Parents or Guardians of Minors. *ib.*

Licence how to be granted. *ib.*

Solemnizing Marriages other than as allowed, Felony and Tranſportation for 14 Years. *ib.*

After Marriage, Proof of Non-reſidence of Parties not allowed. - - - - §3.

But Marriage of Minors by Licence without Conſent of Parents, &c. void. *ib.*

Regiſter of Banns and Marriages to be kept, and ſigned by the Miniſter. - - - §4.

Witneſſes to attend and atteſt Marriage. *ib.*

Forging, deſtroying, or making falſe Entries in Regiſters, Felony without Clergy. *ib.*

Exception as to Marriages of Royal Family, Jews and Quakers, and thoſe beyond Sea. - §5.

Marriages before had in newly-conſecrated Churches made valid by Stat. 21 Geo. 3. c. 53. - §6.

2. *Prohibited Marriages of the Royal Family.* §7.

Perſons ſolemnizing or aſſiſting thereat incur a Præmunire. *ib.*

Clandeſtine

Clandeſtine Marriages.

§ 1. THERE are other offences beſides thoſe treated of in the two laſt chapters, touching illegal marriages, which though perhaps they may with more propriety be claſſed, as an excellent writer has done, under the head of offences againſt the public police and economy, yet for the ſake of bringing the ſame kind of ſubject as much into one view as poſſible, they are here exhibited, together with other offences more immediately againſt the perſon, to which they bear analogy in the ſubject matter. This arrangement may be thought more allowable, when it is conſidered that one of the moſt obvious principles of thoſe ſtatutes out of which the offences in queſtion are derived was, while puniſhment was inflicted for the commiſſion of them as detrimental to the public good, to protect the perſons of thoſe who were moſt expoſed to the ruinous conſequences intended to be prevented.

Mr. Juſtice Blackſtone.

§ 2. *By the marriage act. 26 G. 2. c. 33. Where banns to be publiſhed.*

By the ſtat. 26 Geo. 2. c. 33. "for the better preventing "of clandeſtine marriages," it is enacted, "that all banns "of matrimony ſhall be publiſhed in an audible manner in "the pariſh-church, or in ſome public chapel in which "banns have been uſually publiſhed, of or belonging to "ſuch pariſh or chapelry wherein the perſons to be married "ſhall dwell, according to the form of words preſcribed by "the rubrick prefixed to the office of matrimony in the "book of common prayer, upon three Sundays preceding "the ſolemnization of marriage, during the time of morning "ſervice, or of evening ſervice, (if there be no morning "ſervice in ſuch church, &c. upon any of thoſe Sundays,) "immediately after the ſecond leſſon. And where the "perſons to be married dwell in divers pariſhes, &c. the "banns ſhall in like manner be publiſhed in each, &c. "And where both, or either, dwell in any extra-parochial "place (having no church or chapel wherein banns have "been uſually publiſhed), then the banns ſhall in like man-"ner be publiſhed in ſome adjoining pariſh church or "chapel; in which latter caſe, the miniſter, &c. publiſhing

"ſuch

" ſuch banns, ſhall certify the publication thereof in ſuch " manner as if either of the parties dwelt in ſuch adjoining " pariſh, &c. And in all caſes the marriage ſhall be ſo- " lemnized in one of the pariſh churches or chapels where " ſuch banns have been publiſhed, and in no other place " whatſoever." By ſ. 2. No miniſter, &c. ſhall be obliged to publiſh the banns unleſs the parties ſhall ſeven days before the firſt intended publication deliver to him notice in writing of their true Chriſtian and ſurnames, and of their reſpective abodes within ſuch pariſh, chapelry, or extra-parochial place, and of the time during which they have inhabited there. By ſ. 3. no miniſter, &c. ſolemnizing marriage between perſons, both or one of whom ſhall be under the age of 21 years after banns publiſhed, ſhall be puniſhed by eccleſiaſtical cenſures for ſo doing without conſent of parents or guardians required by law, unleſs ſuch miniſter, &c. ſhall have notice of their diſſent: and in caſe ſuch parents or guardians ſhall publicly declare or cauſe to be declared in the church or chapel where and at the time the banns are ſo publiſhed, their diſſent to ſuch marriage, ſuch publication of banns ſhall be abſolutely void. By ſ. 4. " no licence of " marriage ſhall be granted by any archbiſhop, &c. to " ſolemnize any marriage in any other church or chapel " than in the pariſh church or public chapel of or belonging " to the pariſh or chapelry, within which the uſual place " of abode of one of the perſons to be married ſhall have " been for four weeks immediately before the granting of " ſuch licence, or where both or either of the parties ſhall " dwell in any extra-parochial place, having no church or " chapel wherein banns have been uſually publiſhed, then " in the pariſh church, &c. belonging to ſome adjoining " pariſh, &c. and in no other place whatſoever." " Pro- " vided (ſ. 5.) that all pariſhes where there ſhall be no pariſh " church or chapel belonging thereto, or none wherein " divine ſervice ſhall be uſually celebrated every Sunday, " may be deemed extra-parochial places for the purpoſes of " this act." With another proviſo (ſ. 6.) ſaving the archbiſhop of Canterbury's right to grant " ſpecial licences to " marry at any convenient time or place."

Ch. XIII. § 2. *Marriage act.*

Notice of names and places of abode.

Notice of diſſent of parents, &c. of perſons under age to be given.

Licence.

Then by ſ. 8. " If any perſon ſhall ſolemnize matrimony " in any other place than a church or public chapel, where " banns

Solemnizing marriage other than as above, felony, and tranſportation for 14 years.

Ch. XIII. § 2. *By the marriage act.*

"banns have been uſually publiſhed, unleſs by ſpecial "licence from the archbiſhop of Canterbury; or ſhall "ſolemnize matrimony without publication of banns, unleſs "licence of marriage be firſt obtained from ſome perſon "having authority to grant the ſame; every perſon know-"ingly and wilfully ſo offending, and being lawfully con-"victed thereof, ſhall be guilty of felony and tranſported "to ſome of his Majeſty's plantations in America for 14 "years, according to the laws in force for tranſportation of "felons; and all ſuch marriages ſhall be null and void."

By ſ. 9. "All proſecutions for ſuch felony to be com-"menced within 3 years after the offence committed."

§ 3. *After marriage no proof allowed of non-reſidence of parties, &c. before.*

By ſ. 10. "After the ſolemnization of any marriage by banns ſhall not be neceſſary in ſupport of ſuch marriage to give any proof of the actual dwelling of the parties in the reſpective pariſhes, &c. where the banns were publiſhed; (nor the like where the marriage is by licence:) nor ſhall any evidence be received to prove the contrary in any ſuit touching the validity of ſuch marriage." By ſ. 11. mar-riages by licence, where either of the parties, not being a widow or widower, ſhall be under 21 years of age, had without the previous conſent of the father or lawful guar-dians, or one of them; or if no guardian, then of the mother, if living and unmarried; or if none ſuch, then of a guardian appointed by the court of Chancery, ſhall be null and void. S. 12. ſpecifies certain caſes where application may be made to the Lord Chancellor, &c. to conſent to the marriages of minors.

Marriage by Li-cenſe without con-ſent of parents, &c. of minors void.

§ 4. *Regiſter of banns and marriages to be kept,*

Then "for preventing undue entries and abuſes in regiſ-"ters of marriage," ſ. 14. enacts, "that the church and "chapel wardens of every pariſh or chapelry, ſhall provide "proper books, in which all marriages and banns of mar-"riage reſpectively there publiſhed or ſolemnized ſhall "be regiſtered, (every page of which is to be regularly "numbered and lined at proper diſtances, in the manner "therein mentioned,) and ſhall reſpectively be ſigned by "the parſon, vicar, miniſter, or curate, or by ſome other "perſon in his preſence and by his direction. And all "ſuch books ſhall belong to every ſuch pariſh or chapel,

and ſigned by the miniſter, &c.

"and

" and be kept for public uſe." By ſ. 15. " In order to " preſerve the evidence of marriages, and to make the " proof thereof more certain and eaſy, and for the direction " of miniſters in the celebration and regiſtering of mar- " riages;" " all marriages ſhall be ſolemnized in the pre- " ſence of two or more credible witneſſes beſides the miniſter; " and immediately after ſuch celebration an entry thereof " ſhall be made in ſuch regiſter; in which it ſhall be ex- " preſſed that the marriage was by banns or licence; and " if both or either of the parties married by licence be " under age, with conſent of the parents or guardians, as " the caſe may be; and ſhall be ſigned by the miniſter with " his proper addition, and alſo by the parties married, and " atteſted by ſuch two witneſſes;" which entry is directed to be in the form or to the effect therein ſet forth.

Ch. XIII. § 4. *Regiſter of banns and marriages to be kept.*

in the preſence of two witneſſes, and atteſted by them.

Then by ſ. 16. " If any perſon ſhall with intent to elude " the force of this act, knowingly and wilfully inſert or " cauſe to be inſerted in the regiſter book of ſuch pariſh or " chapelry as aforeſaid any falſe entry of any matter or " thing relating to any marriage; or falſely make, alter, " forge, or counterfeit, or cauſe, &c. or act or aſſiſt in " falſely making, &c. any ſuch entry in ſuch regiſter; or " any ſuch licence of marriage as aforeſaid; or utter or " publiſh as true any ſuch falſe, altered, forged, or counter- " feited regiſter as aforeſaid, or a copy thereof, or any ſuch " falſe &c. licence, knowing ſuch regiſter or licence of " marriage reſpectively to be falſe, &c.; or if any perſon " ſhall wilfully deſtroy or cauſe or procure to be deſtroyed " any regiſter-book of marriages, or any part thereof, with " intent to avoid any marriage, or to ſubject any perſon to " any of the penalties of this act, every perſon ſo offend- " ing, being thereof lawfully convicted, ſhall be guilty of " felony, without benefit of clergy."

Forging or making falſe entries in regiſter, &c. felony without clergy. Vide Dudley's caſe, 2 Sid. 72. *Miſdemeanors at common law.*

Sect. 17. provides that nothing in the act " ſhall extend " to the marriages of any of the royal family;" " nor " (by ſ. 18.) to Scotland; nor to any marriages amongſt " Quakers or Jews, where both the parties to any ſuch " marriage ſhall be Quakers or Jews; nor to any marriages " ſolemnized beyond the ſeas."

§ 5. *Exceptions as to the royal family; Jews and Quakers; Scotland, or places beyond ſea.*

By

Ch. XIII. § 6. *Marriages in new churches.*

§ 6. 21 G. 3. c. 53.

By ſtat. 21 Geo. 3. c. 53. ſ. 1. "all marriages then "ſolemnized or to be ſolemnized before the 1ſt of Auguſt "1781, in any church or public chapel in England, Wales, "and Berwick-upon-Tweed, erected ſince the making of "the (laſt-mentioned) act, and conſecrated, ſhall be as valid "in law as if they had been ſolemnized in pariſh churches, "&c. wherein banns had been uſually publiſhed before or "at the time of paſſing the ſaid act." This proviſion was rendered neceſſary by the determination of the court of King's Bench in Rex v. The Inhabitants of Northfield, in Eaſter term 1781, declaring ſuch marriages to be void by the marriage act: but its operation is not proſpective.

R. v. Northfield, Dougl. 659.

Vide 15 Vin. Abr. 258.

Some of the offences puniſhable by the marriage act were before prohibited by the canons of the church, and ſome were ſubjected to pecuniary forfeitures by the ſtatutes 6 & 7 W. 3. c. 6. ſ. 52., and 7 & 8 W. 3. c. 35. ſ. 2., and 10 Ann. c. 19. ſ. 176. which are now merged in felony.

2. *Of prohibited Marriages of the Royal Family.*

§ 7. *Marriages of the royal family.* 11 St. Tr. 295.

By a reſolution of the Judges in Hilary term 1717, upon a queſtion referred to them by command of the king, the prerogative of the crown to ſuperintend and approve of the marriages of the royal family was fully recognized. This prerogative, which is founded in the ſoundeſt national policy as well as in due decorum, is further confirmed by the expreſs enactment of the legiſlature in the ſtat. 12 Geo. 3. c. 11. "That no deſcendant male or female of the body of "his late Majeſty King George the ſecond, (other than the "iſſue of princeſſes who have married or may hereafter "marry into foreign families,) ſhall be capable of contract- "ing matrimony, without the previous conſent of his ma- "jeſty, his heirs or ſucceſſors, ſignified under the great ſeal "and declared in council; (which conſent, to preſerve the "memory thereof, is hereby directed to be ſet out in the "licence and regiſter of marriage, and to be entered in the "books of the privy council;) and that every marriage or "matrimonial contract of any ſuch deſcendant, without "ſuch conſent firſt had and obtained, ſhall be null and void "to all intents and purpoſes whatſoever." With a proviſo, (ſ. 2.) "that in caſe any ſuch deſcendant, being above 25 "years of age, ſhall perſiſt in their reſolution to contract a "marriage

12 G. 3. c. 11.

" marriage ſo diſapproved of; then ſuch deſcendant on " giving notice to the privy council (to be entered in the " books thereof) may, at any time from the expiration of " 12 calendar months after ſuch notice, contract ſuch mar- " riage with the perſon before propoſed and rejected, (and " ſuch marriage ſhall be valid without the previous conſent " of the crown), unleſs both Houſes of Parliament ſhall " before the expiration of the ſaid 12 months expreſsly de- " clare their diſapprobation of the ſame."

Then by ſ. 3. " Every perſon who ſhall knowingly or " wilfully preſume to ſolemnize, or to aſſiſt, or to be preſent " at, the celebration of any marriage with any ſuch de- " ſcendant, or at his or her making any matrimonial con- " tract, without ſuch conſent as aforeſaid firſt had and " obtained, except in the caſe abovementioned, ſhall, being " duly convicted thereof, incur and ſuffer the pains and " penalties of the ſtatute of proviſion and præmunire, " 16 Ric. 2."

Perſons ſolemnizing or aſſiſting at ſuch marriages incur a præmunire.

CHAP. XIV.

SODOMY,

§ 1. *Definition.* 3 Inſt. 58, 9. 1 Hale, 669. 1 Hawk. ch. 4. ſ. 1. 2 MS. Sum. 336. 3 Kel. 8co. 4 Blac. Com. 215. 12 Co. 37.

THIS offence, concerning which the leaſt notice is the beſt, conſiſts in a carnal knowledge committed againſt the order of nature by man with man, or in the ſame unnatural manner with woman, or by man or woman in any manner with beaſt. The nature of the evidence with reſpect to the actual commiſſion of this offence being the ſame as in caſe of rape, it is ſufficient to refer to that head. And in proportion as the crime is moſt deteſtable, ſo ought the proof of guilt to be the cleareſt and moſt undoubted.

§ 2. *Principals and acceſſaries, and their puniſhment.* 25 H. 8. c. 6. 5 Eliz. c. 17.

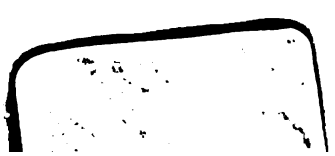
By ſtat. 25 H. 8. c. 6. revived, confirmed, and made perpetual by ſt. 5 Eliz. c. 17. reciting that "Foraſmuch "as there is not yet ſufficient and condign puniſhment for "the deteſtable and abominable vice of Buggery committed "with mankind or beaſt," enacts, "that the ſame offence "be from thenceforth adjudged felony; and the offenders "being thereof convicted by verdict, confeſſion, or out-"lawry, (ſtanding mute, not directly anſwering, or chal-"lenging peremptorily above 20, being ſupplied by the ſtat. "3 & 4 W. & M. c. 9. ſ. 2.) ſhall ſuffer death as felons, "without benefit of clergy."

2 Hale, 632. 669, 670. 3 Inſt. 59 2 MS. Sum. 336.

This being made felony generally, there may be acceſſaries both before and after, neither of whom however are ouſted of clergy. But thoſe who are preſent aiding and abetting to the fact are principals, and excluded clergy. If the party on whom the offence is committed be within the age of diſcretion, namely, under 14, it is not felony in him, but only in the agent. If both be of the age of diſcretion, it is felony in both.

22 G. 2. c. 33. ſ. 19. *By mariners.*

By the articles of the navy, 22 Geo. 2. c. 33. mariners guilty of this crime, their aiders and abettors, are puniſhable with death by the judgment of a court martial.

§ 3. 3 Inſt. 59. 1 Hawk. ch. 4. ſ. 2. Foſt. 424. Appx. to edit. of 1792.

The indictment has the words contra naturæ ordinem rem habuit veneream, et carnaliter cognovit: but Mr. Juſtice Foſter ſays this was never thought ſufficient without alſo charging, peccatumque illud ſodomiticum, anglice dictum Buggery, (the term made uſe of by the ſtatute,) adtunc et ibidem nequiter felonice, &c. commiſit et perpetravit; and he refers to Co. Entr. 351. b. as a precedent ſettled by great advice.